PREME COURT, U. S.

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1102

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and BERNARD SAMOFF, Regional Director of the Fourth Region of the National Labor Relations Board,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, National Maritime Union of America, AFL-CIO, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, dated December 9, 1974, in the case docketed before Court of Appeals as No. 74-1613.

Opinions Below

The United States Court of Appeals for the Third Circuit did not issue an opinion. Instead, it issued a Judgment Order dated December 9, 1974, affirming the judgment of the United States District Court for the Eastern District of

Pennsylvania. The Judgment Order of the Court of Appeals is printed in the Appendix hereto (71a). The Opinion of the District Court is reported at 375 F. Supp. 421 (E.D. Pa. 1974) and is printed in the Appendix hereto (32a). The Decision and Order of the National Labor Relations Board herein sought to be set aside is reported at 202 NLRB No. 156, and is printed in the Appendix hereto (20a). A prior related unreported Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania dated November 9, 1971, in Civil Action No. 71-881, is also printed in the Appendix hereto (10a).

Jurisdiction

The Judgment of the Court of Appeals was dated December 9, 1974 and issued in lieu of a formal mandate on December 31, 1974. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

Questions Presented

When the National Labor Relations Board has determined after a hearing held pursuant to Section 9(c)(1) of the National Labor Relations Act as amended, 29 U.S.C. § 159(c), that there is a question of representation affecting commerce and that it has statutory jurisdiction over an employer, but declines to exercise its jurisdiction on the ground that to do so would adversely affect the foreign relations of the United States:

1. Does not a United States District Court have jurisdiction under 28 U.S.C. § 1337 to set aside such Board action as a violation of a "clear and mandatory" statutory command?

2. Does not a United States District Court have jurisdiction to review such Board action under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 710 et seq. since it is final agency action for which there is "no other adequate remedy in a court" and judicial review of this matter is not otherwise statutorily precluded?

3. Is not the denial of the right to judicial review to a labor organization petitioning under Section 9(c), when such right is available to the employer, a denial of "due process" and "equal protection of the laws" under the 5th Amendment to the U.S. Constitution?

Constitutional and Statutory Provision Involved

The 5th Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 9(c)(1) of the National Labor Relations Act, as amended, 61 Stat. 143, 29 U.S.C. § 159(c)(1):

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 701 *et seq.* The full text is printed in the Appendix hereto (73a).

Statement of the Case

This action was commenced in the United States District Court for the Eastern District of Pennsylvania by National Maritime Union of America, AFL-CIO (hereinafter referred to as "NMU" or the "Union") on April 14, 1971, for an Order compelling the National Labor Relations Board (hereinafter referred to as the "Board" or the "NLRB") and its Regional Director to assert jurisdiction in a representation proceeding designated as *Contract Services, Inc.* (Case No. 4-RC-8995.) The jurisdiction of the District Court was invoked under, inter alia, 28 U.S.C. § 1337 and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* The representation proceeding had been instituted by NMU by the filing of a representation petition with the Board's Fourth Region on January 11, 1971 (17a). That petition sought certification from the Board as the exclusive collective bargaining representative for a unit of all bus drivers, mechanics, dispatchers and related personnel employed by Contract Services, Inc. in the Canal Zone (17a).

On January 26, 1971, the Regional Director dismissed NMU's petition without a hearing (1a). The Union's appeal of this dismissal was denied by the Board in a letter dated March 10, 1971 (3a) in which the Board noted that there was no compelling reason to depart from its decision in *United Fruit Co.*, 159 NLRB 135 (1966), direct review denied, *National Maritime Union* v. *NLRB*, 267 F. Supp. 117 (SDNY 1967), where it had declined to assert jurisdic-

tion over a representation petition involving employees employed by a U.S. concern in the Canal Zone for fear of upsetting treaty negotiations then going on between the United States and the Republic of Panama.

Following the commencement of this action the Board moved to dismiss the complaint on the alternative grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted (11a). The motion was denied on November 9, 1971 by order of the Honorable Thomas Masterson (14a). That order directed that a hearing be held before the District Court with regard to the authority of the Board to decline jurisdiction in this case.[1]

Before the hearing could be held pursuant to Judge Masterson's order, the Board reconsidered its dismissal and issued an Order dated December 10, 1971 in which Case No. 8995 was remanded to the Regional Director for the purpose of conducting a representation hearing pursuant to Board regulations (17a). Pursuant to stipulations between the parties all further proceedings before the District Court were stayed pending decision by the Board (14a).

A hearing was conducted on April 4, 1972, and one year later, on April 3, 1973, the Board issued its decision once

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[1] Judge Masterson directed a hearing on the following issues:

(1) Whether the effect on foreign relations is a valid factor for the Board to consider in deciding to decline jurisdiction;

(2) If so, whether the assertion of jurisdiction would adversely affect the United States-Panama relations;

(3) Whether the Canal Zone is a state, foreign country or territory within the definition of commerce in the National Labor Relations Act, as amended;

(4) Whether there are any other reasons why the Court should decline to order the Board to comply with its alleged statutory duties in this case (13a).

again dismissing the petition. *Contract Services, Inc.* 202 NLRB No. 156 (1973) (20a). Although the Board found that all the statutory requisites were present for the exercise of jurisdiction in this case, it nevertheless declined to assert jurisdiction.

Thus, the Board found that the employer was a Delaware corporation engaged in the operation of a local bus system transporting U.S. military dependents to and from schools within the Canal Zone (32a). The Company participated in the necessary volume of business purchases and relationship to the national defense, according to the Board to "bring it within our standards for the assertion of jurisdiction." (22a-23a). Moreover, the Board also concluded the business operations by U.S. employers in the Canal Zone were within the definition of "commerce" set forth at Section 2(6) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(6), thereby vesting the Board with statutory authority to assert jurisdiction (26a).

However, the Board concluded "That it would not effectuate the policies of the Act to assert jurisdiction . . . since such action might at this time adversely affect United States-Panamanian relations." (30a-31a).

Following the decision of the Board, NMU moved for an order compelling the Board to reinstate its petition and assert jurisdiction (32a). The Board renewed its motion to dismiss. On May 6, 1974 the District Court (Fogel, J.) issued its decision dismissing the action for lack of subject matter jurisdiction (32a). The Court specifically did not reach the question of whether the action stated a claim upon which relief could be granted.

Although concluding that a district court does have jurisdiction under 28 U.S.C. § 1337[2] to remedy Board action which violates a "clear and mandatory" provision of the National Labor Relations Act, as amended, the District Court held that the provisions of Section 9(c)(1) of that Act "are not sufficiently 'clear and mandatory' to confer jurisdiction on Federal District Courts . . ."(59a).

In addition, the District Court held that Section 10 of the Administrative Procedure Act, 5 U.S.C. § 701 et. seq. did not accord jurisdiction in this case since that statute is "remedial and not jurisdictional in nature"(68a).

On appeal, the Court of Appeals affirmed the decision of the District Court without issuing an opinion, choosing instead to rely on the opinion of the District Court (71a).

REASONS FOR GRANTING THE WRIT

I.

The Court Below's Application Of The "Clear And Mandatory" Standard In Declining To Remedy A Refusal Of The NLRB To Assert Jurisdiction In A Representation Proceeding Conflicts With The Decision Of This Court In *Leedom* v. *Kyne*, 358 U.S. 184 (1958), Is In Conflict With Decisions Rendered By The United States Court of Appeals For The Fifth Circuit And Raises An Important Question Governing The Administration Of Federal Labor Laws Which Should Be Decided By This Court.

A.

Section 9 of the National Labor Relations Act, as amended, 29 U.S.C. § 150 (the "Act"), sets forth the statutory scheme through which Congress has delegated au-

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[2] 28 U.S.C. § 1337 provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

thority to the National Labor Relations Board to certify labor organizations as the exclusive bargaining representative for appropriate units of employees. The resolution of this case hinges on interpretation of Section 9(c)(1) of the Act which specifies the manner in which the Board is to ascertain whether there is a "question of representation affecting commerce" and directs the Board to conduct a secret ballot election and certify the results thereof in order to resolve such a question of representation.

Essentially, Section 9(c)(1) prescribes a five step process to deal with questions concerning the representation of "employees." That process includes:

1. The filing of a petition by, among other entities, a labor organization alleging that a substantial number of employees in a unit wish to be represented for collective bargaining by such organization;

2. An administrative investigation by the Board in order to determine whether there is reasonable cause to believe that the petition raises a question of representation affecting commerce and upon a finding that such reasonable cause exists;

3. A hearing conducted by the Board to ascertain whether such a question of representation actually exists and upon a finding that there is such a question;

4. An election by secret ballot among the employees in a designated unit; and

5. Certification of the results thereof.

In this case the Board proceeded through the first three steps described above. However, after concluding that a

question of representation affecting commerce did exist and that statutory jurisdiction existed over the employer in question, the Board refused to take the remaining two steps and dismissed the petition on the grounds that the assertion of jurisdiction might adversely affect foreign relations between the United States and Panama.

Although the Act specifically provides for judicial review of Board action in unfair labor practice cases,[3] no such provision is made for review of orders entered by the Board in representation cases under Section 9. Nonetheless, this Court has held that United States District Courts have jurisdiction to remedy action taken by the Board pursuant to Section 9 which is contrary to a "clear and mandatory" provision of that statute and thereby destroys statutory rights granted by Congress. *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

In *Leedom* v. *Kyne*, the Board had approved a bargaining unit composed of both professional and nonprofessional employees despite the clear language of Section 9(b)(1) of the Act which states that the Board "*shall not*" approve such a unit unless a majority of the professionals agree to such inclusion. The petitioning labor organization opposed this unit designation and following certification it instituted an action at the district court level to set aside the Board's action. Jurisdiction was asserted under 28 U.S.C. § 1337.

The issue to be resolved, as framed by the Court in *Kyne* was whether the law, "apart from the review provisions of the * * * Act," afforded a remedy for unlawful action of the Board which had inflicted injury on a party. This question was answered in the affirmative, the Court noting at Page 188:

> "this suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made

[3] See Section 10(f) of the Act, 29 U.S.C. § 160(f).

> within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition of the Act."

Using language that has since been seized upon by lower courts, including the court below, the Court found that since Section 9(b)(1) was "clear and mandatory," the Board's action was an exercise of undelegated power and deprived the professional employees of a "right" guaranteed to them by Congress. It thus concluded:

> "Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given" (Page 189).

This conclusion was further buttressed by the Court by recourse to its decision in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943) where the following principle was enunciated at Page 300:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control."

This principle was reaffirmed by the Court in *Kyne* which noted at Page 190 that:

> "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."

This emphasis by the Court on enforcement of rights given by Congress was lost sight of by the court below when

it fashioned its rather narrow view of the standards to be applied by Federal Courts in this type of case.

The court below concluded that the *Kyne* rule:

> "should neither be mechanically restricted to violations of 'shall not' clauses in the Act, nor automatically extend to any clause which contains the word 'shall'[4] or similar language or apparently mandatory intent. Rather it is the task of the District Court to carefully examine the provision in question, and to determine from the context, from the structure and purposes of the Act as a whole, from prior practice in the Board and decisions in the Courts, whether the terms are indeed sufficiently 'clear and mandatory' to confer jurisdiction under the rule of *Kyne*." (48a-49a)

The test fashioned by the court below loses sight of this Court's admonition in *Leedom* v. *Kyne* that Congress cannot have intended to permit the Board to trammel on statutory rights without injured parties having recourse to the Federal Courts. The District Court appears to have concluded that the Supreme Court's later decision in *Boire* v. *Greyhound Corporation*, 376 U.S. 473 (1964) narrowed the rule enumerated in *Kyne*. But this is not the case.

In *Boire*, the Court observed at Pages 481-82:

> "The Kyne exception is a narrow one, not to be extended to permit plenary district court review to Board orders in certification proceedings whenever

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[4] Decisions by Court of Appeals following the decision in *Leedom* v. *Kyne*, have held that the principle adopted in that case applies to Board of violations of "shall" clauses in the Act, as well as "shall not" clauses. See *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch*, 322 F.2d 993 (D.C. Cir. 1963); *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064 (5 Cir. 1971).

> it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law."

The above cited language in no way narrows the holding in *Kyne*. It simply states that *Kyne*-type jurisdiction is not available to review Board action which rests upon an assessment of certain facts. Instead, *Kyne* only applies to Board violations of the Act which do not hinge on particular fact findings and which impair rights granted by Congress.

In this case the Board concluded that it had the authority to decline to assert jurisdiction after it determines that a question of representation affecting commerce and statutory jurisdiction over the employer exists. This is a straight question of law without factual considerations and is surely ripe for judicial consideration.

In sum, the test to be followed by Federal District Courts in considering jurisdiction over *Kyne*-type cases undoubtedly focuses on whether there has been a violation by the Board of a "clear and mandatory" statutory command. However, in assessing the statutory provision in question it is also necessary to consider the rights conferred by the statute and the importance of these rights in the framework of the Act in its entirety. This approach was not utilized by the court below.

B.

On its face the language of Section 9(c)(1), as it applies to this case, is clear and unassailable. It provides in pertinent part that:

> "If the Board finds upon the record of such hearing that such a question of representation (affecting

> commerce) exists, it *shall* direct an election by secret ballot and *shall* certify the results thereof." (Emphasis supplied.)

Here, after examining the hearing record the Board did find that such a "question of representation" existed [5] and further expressly concluded that it had statutory jurisdiction over the employer. Nonetheless, it refused to obey the command of the statute that it *direct* an election and *certify* the results thereof.

As a result of this refusal to direct an election and certify the results, the employees represented by NMU, as well as NMU itself, were deprived of rights conferred by Congress in the Act. Thus, Section 7 of the Act, 29 U.S.C. § 157, provides, *inter alia*, that:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . ."

However, when, as here, the representative of their choice is barred access to the representation process afforded by Section 9(c)(1), the rights guaranteed by Section 7 are hollow rights indeed. If an employer or labor organization attempted to interfere with these rights, the employees would have recourse under Sections 8(a)(1) and (b)(1) of the Act, 29 U.S.C. § 158(a)(1) and (b)(1). Surely, the Board is in no better position that an offending employer or union when it infringes on Section 7 rights and must be subject to being held to account by a federal district court.

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[5] The Board found that "the Employer's volume of business purchases, and relationship to our national defense bring it within our standards for the assertion of jurisdiction." (22a-23a)

Similarly, Section 9(c)(1) grants to labor organizations the right to file a representation petition and the right to have this petition processed in accordance with the Act. The failure to properly process such a petition is no less a violation of a right conferred by Congress.

In *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064, 1068 (5 Cir. 1971), Justice Clark, speaking for the court, stated in no uncertain terms that the "shall" commands of Section 9(c)(1) are mandatory:

> "Section 7 of the Act explicitly gives employees the right 'to bargain collectively through representatives of their own choosing, and * * * to refrain from any or all of such activities.' 29 U.S.C. § 157. In order to make certain that this right is fully protected, Congress directed the Board in mandatory language that '*whenever* petition shall be filed' alleging that the currently recognized bargaining agent is no longer a representative of the employee (as defined by the Act), 'the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide for an appropriate hearing upon due notice.' * * * If the Board finds * * * that such a question of representation exists, it *shall* direct an election.' * * *'"

The emphases in the above quote are all those of the Court and plainly demonstrate the Court's view that if Section 7 rights are to be adequately protected, Section 9(c)(1) must be given a mandatory reading.[6]

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[6] See also *Surrat* v. *NLRB*, 463 F.2d 378 (5 Cir. 1972); *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch*, 322 F.2d 993 (D.C. Cir. 1963); *United Automobile, A & A.I. Workers of America* v. *NLRB*, 317 F. Supp. 1162 (D.D.C. 1970) and *I.U.E.* v. *NLRB*, 67 L.R.R.M. 2361 (D.D.C. 1968).

The court below concluded, however, that despite the mandatory language of Section 9(c)(1), that statute was not sufficiently "clear and mandatory" to warrant District Court intervention to remedy a Board violation of a mandatory command contained therein. In *Temperton* and *Surrat*, however, the Fifth Circuit held that such intervention was necessary to prevent deprivation of important statutory rights.

The question raised herein is vital to the administration of this Nation's labor laws. Section 9(c)(1) of the Act, which governs the conducting of representation elections, is a pivotal portion of legislation designed to provide employees with the means of obtaining union representation if they so desire. Congress couched this important legislation in mandatory terms, leaving room for Board discretion in the area of determining whether a question of representation affecting commerce exists. Under these circumstances, this Court should resolve the question of whether the Board can ignore the mandatory command of the statute that it direct an election once such a question of representation is found to exist and statutory jurisdiction is conceded.

II.

The Holding Of The Court Below That Section 10 Of The Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Does Not Afford A Basis For Jurisdiction In This Case Is In Conflict With Decisions Of This Court And Other Courts Of Appeals.

The issues presented by this case include questions as to whether the Board, as an administrative agency of the United States, is acting in excess of its statutory authority or contrary to constitutional rights, or is otherwise abusing

its discretion or acting contrary to law. Federal District Courts have jurisdiction, in most instances, to resolve such issues under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (the "A.P.A.").

The court below rejected the application of the A.P.A. as a basis for jurisdiction in this case, relying on the Third Circuit's opinions in *Local 542, International Union of Operating Engineers* v. *NLRB*, 328 F. 2d 850 (3 Cir. 1964) and *Zimmerman* v. *U.S.*, 422 F. 2d 326 (3 Cir. 1970). See also Judge Stahl's concurring opinion in *Charlton* v. *U.S.*, 412 F. 2d 390, 395 (3 Cir. 1969). There can be no doubt that those cases stand for the proposition that in the Third Circuit, the A.P.A. is remedial in nature and not jurisdictional. We respectfully submit, however, that the position of the Third Circuit is at variance with principles enunciated by this Court and decisions issued by the Court of Appeals for the Fourth, Fifth and District of Columbia Circuits, and that certiorari should be granted to remedy this variance.

On its face, Section 10 of the A.P.A. clearly provides for the right to judicial review of alleged improper agency action. The right to judicial review is expressed at 5 U.S.C. § 702 which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. § 704 denotes what agency action is reviewable and states in pertinent part:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ."

Finally, 5 U.S.C. § 706 describes the scope of review of agency action in the following language:

> "To the extent necessary to decision and when presented, the reviewing court shall decide relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (D) without observance of procedure required by law;
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record of those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Hoverew, 5 U.S.C. § 701(a) places limitations on this scope of review by providing:

> "(a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law."

Surely, it would not have been necessary for Congress to carve out these two exceptions if it had not contemplated that federal courts would otherwise have jurisdiction to review under the remaining portions of Section 10.

The district court's reluctance to conclude that the A.P.A. is jurisdictional, despite the apparent leaning of Judge Stahl's opinion in *Charlton* seems to stem from adherence to the Third Circuit's 1964 decision in *Local 542,* and its conclusion that "No Supreme Court decision holds that section 10 of A.P.A. is a grant of jurisdiction" (in *Zimmerman* at Pages 330-31). We respectfully submit that this conclusion overlooks the decisions of the Supreme Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967); *Toilet Goods Association* v. *Gardner,* 387 U.S. 158 (1967); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971); and *Rusk* v. *Cort,* 369 U.S. 367, 371-72 (1962), as well as Court of Appeals decision in *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970); *Templeton* v. *Dixie Color Printing Co.,* 444 F.2d 1064 (5 Cir. 1971); *Deering-Milliken* v. *Johnson,* 295 F.2d 856 (4 Cir. 1961).

In *Citizens to Preserve Overton Park* this Court appears to have taken the ultimate step of concluding that Section 10 of the A.P.A. is jurisdictional.

Jurisdiction in that case was alleged to lie under Section 10.[7] In affirming the right to sue under the A.P.A. the Court found at Page 410:

> "A threshold question—whether petitioners are entitled to any judicial review—is easily answered. Section 701 of the Administrative Procedure Act, 5 U.S.C. § 701 (1964 ed., Supp. V), provides that the action of 'each authority of the Government of the United States,' which includes the Department of Transportation, is subject to judicial review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.' In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no 'showing of "clear and convincing evidence" of a . . . . legislative intent' to restrict access to judicial review. . . .
>
> "Similarly, the Secretary's decision here does not fall within the exception for action 'committed to agency discretion.' This is a very narrow exception." (Citations and Footnote Omitted)

At least two courts of appeals have held that Section 10 confers jurisdiction to review the action of the Board in a representation proceeding. *Templeton* v. *Dixie Color Printing Co.*, 444 F. 2d 1064, 1070 (Fnt. 3) (5 Cir. 1971); *Deering Milliken* v. *Johnson*, 295 F. 2d 856 (4 Cir. 1961). Neither of those cases concluded that judicial review was precluded by the Act or that the Board's action was committed to its discretion by law.

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[7] See 309 F. Supp. 1189, at 1193.

Clearly, there is nothing in the Act itself which would preclude judicial remedy of unlawful Board action—a fact recognized in *Leedom* v. *Kyne, supra.* Indeed, the legislative history of the A.P.A. establishes that to preclude judicial review, a statute "must upon its fact give clear and convincing evidence of an intent to withhold it. The mere failure to provide specifically by statute for judicial review is certainly no evidence of intent to withhold review."[8] Nowhere on the face of the Act is there such "clear and convincing" evidence of intent to preclude review of unlawful Board action which infringes on rights granted by the Act.

Nor can it be said that the Board's action in refusing to direct an election is committed by law to its discretion. The mandatory nature of Section 9(c)(1) takes this case out of the "discretion" category of 5 U.S.C. § 701(a)(1) even if some aspects of Section 9(c)(1) involve the exercise of discretion. See *Knight Newspapers, Inc.* v. *U.S.*, 395 F.2d 353, 358 (6 Cir. 1968) where the court noted:

> "It is well settled that the mere fact that all agency action involves some degree of discretion of judgment does not render every agency action unreviewable under the provisions of the Administrative Procedure Act prohibiting judicial review of agency action by law committed to agency discretion. A court may not review a decision permitted to the discretion of an agency pursuant to a permissive type statute, but may do so where the decision was made pursuant to a mandatory type statute, even though the latter decision involves some degree of

[8] H. R. Rep. No. 1980, 79th Cong. 2d Sess. 41 (1946), U.S. Code Cong. Serv. 1946, p. 1195, cited at Footnote 2 of *Abbott Laboratories* v. *Gardner*, 387 U.S. at Page 140.

discretion. *Ferry* v. *Udall*, 336 F.2d 706 (C.A. 9, 1964) cert. denied 381 U.S. 904, 85 S. Ct. 1449, 14 L.Ed. 2d 286 (1965)."

In this case the Board, acting as an administrative agency, has refused to do something Section 9(c)(1) says it "shall" do. 5 U.S.C. § 706 specifically provides that a reviewing court shall compel agency action "unlawfully withheld." Accordingly, it is not necessary to deeply delve into the merits of the case in order to grant jurisdiction under the A.P.A.—a point which much troubled the district court in its analysis of the *Leedom* v. *Kyne* doctrine. Since 5 U.S.C. §§ 702 and 704 clearly provide that aggrieved parties are entitled to judicial review of final agency action unlawfully withheld, the mere allegation of the Board's improper failure to act under Section 9(c)(1) should be sufficient to confer jurisdiction in order to ascertain on the merits whether Board action was unlawfully withheld.

III.

The Denial Of The Right To Judicial Review To A Petitioning Labor Organization Of An Order Of The Board In A Representation Proceeding When Such Right Is Available To An Employer Raises Important Constitutional Questions Which Should Be Considered By This Court.

In any representation proceeding under Section 9(c)(1) of the Act there are at least two parties—a labor organization and an employer. Often there are other labor organizations who will intervene in such a proceeding to compete for the right to represent the employees in question. At the conclusion of a representation proceeding under Section 9(c)(1) essentially one of two things can happen. The Board will either dismiss the petition or order an election. If a valid election is held and a labor organiza-

tion is victorious, it will be certified by the Board as the exclusive bargaining representative for the unit of employees in question. However, because of the peculiar statutory framework of the Act, coupled with restrictive judicial holdings, an employer is entitled to judicial review of Board action in a representation proceeding while the union which filed the petition is not.

From an employer's standpoint, an adverse result in a representation proceeding is the certification of a labor organization with whom it will be required to bargain. However, by refusing to bargain with the certified labor organization, the employer may obtain judicial review of the Board action in a representation proceeding through the interaction of Sections 8(a)(5), 10 and 9(d) of the Act. Thus, Section 8(a)(5)[9] makes it an unfair labor practice for an employer to refuse to bargain with a labor organization duly designated by the Board as the collective bargaining representative of its employees. Sections 10(a)(b) and (c)[10] of the Act enable the Board to issue a complaint against an offending employer and to issue a bargaining order after hearing. However, an employer may obtain judicial review of such an order under Section 10(f)[11] of the Act and if the Board order is based on facts ascertained in a representation proceeding, then the entire record in that proceeding may be considered by the reviewing court under Section 9(d)[12] of the Act.

On the other hand the most adverse result which can be suffered by a petitioning labor organization is what occurred in this case—its petition can be dismissed without

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[9] 29 U.S.C. § 158(a)(5).

[10] 29 U.S.C.§ 160(a)(b) and (c).

[11] 29 U.S.C. § 160(f).

[12] 29 U.S.C. § 159(d).

a direction of an election. In such an instance there is no express provision in the Act permitting judicial review and, with certain narrow exceptions discussed at length by the Court below, neither federal district courts nor Courts of Appeals will allow judicial review of a Board order dismissing a petition in a representation case.

The net result is that employers may effectively appeal adverse decisions in representation cases while labor organizations may not. Nowhere can there be found any justification for this unfair disparity of treatment.

The entire tenor of the Legislative History of Section 9(d) demonstrates that in limiting review, Congress intended to prevent employers or "rival" unions from engaging in dilatory tactics which would delay the certification of the victorious union.[13]

In the type of case presented at bar, however, the problem of delay is not present. Since the petition has been dismissed, there can be no certification and hence no opportunity to delay the collective bargaining process. Without the spector of delay there is simply no justifiable policy reason to deny judicial review of the dismissal of a representation petition while making it available to an employer who loses a representation election.

Nor is it an answer to say, as some courts have said, that the problem must be solved by Congress. If this application of the Act has resulted in a Constitutional infirmity, the federal courts traditionally have had the power to remedy the situation.

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[13] House Report No. 245 on H.R. 3020, I Leg. Hist. 334; House Minority Report No. 245 on H.R. 2030, I Leg. Hist. 384; House Conference Report No. 510 on H.R. 3020, I Leg. Hist. 560-61 and remarks of Senator Taft at II Leg. Hist. 1542. See also *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064, at Page 1069.

On its face the denial of access to the courts to labor organizations while granting access to employers appears to be a denial of "equal protection of the laws." The Fourteenth Amendment, of course, prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." In this case, however, it is the federal government and not a state government which is involved. Nonetheless, it is now generally accepted that the concept of "equal protection" is embodied in the due process clause of the Fifth Amendment, although it has not yet been determined whether Fifth Amendment equal protection is coextensive with Fourteenth Amendment due process.

In *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), this Court stated:

> "The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

See also *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964) and *Shapiro* v. *Thompson*, 394 U.S. 618, 642 (1969) where the Court noted:

> "While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process."

The question remains as to whether the discrimination in this case; namely, the disparate treatment of labor organizations and employers regarding judicial review, is so unjustifiable as to be violative of due process.

In this case, different conditions have been created for employers and labor organizations in their respective efforts to have their cases heard by a court. To say that employers may not directly appeal from a decision in a representation case is no answer since they effectively get that appeal through an unfair labor practice proceeding. There is no comparable unfair labor practice proceeding available to a labor organization.

There can be no question that under our system of jurisprudence it is fundamental that all parties to a proceeding should have equal access to the courts. If one party is denied that access while it is granted to another and there is no rational basis for that disparate treatment, then surely a remedy exists under the Fifth Amendment.[14]

It appears that in at least one case this Court has approved the use of the Fifth Amendment as a means of acquiring district court jurisdiction over efforts to remedy a decision of the Board in a representation proceeding. *Hotel Employees Local No. 255* v. *Leedom*, 358 U.S. 99

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[14] See *Griffin* v. *Illinois*, 351 U.S. 12 (1956), where the denial of appellate review to indigent defendants was adjudged a violation of the "equal protection" and "due process" clauses of the Fourteenth Amendment, and *Swick* v. *Glenn L. Martin Co.*, 68 F. Supp. 863, 869 (D. Md. 1946), aff'd 160 F.2d 483 (4 Cir. 1947), cert. den'd 332 U.S. 772, where the Court stated:

> "Equal protection of the laws in the sense it is used in the Fourteenth Amendment implies that all litigants similarly situated may appeal to the Courts for relief under like conditions and without discrimination."

(1958). There, this Court held that it was improper for the Board to refuse jurisdiction over the hotel industry as a whole, relying on its decision in *Office Employees International Union* v. *NLRB*, 353 U.S. 13 (1957). In the *Hotel Employees* case, as here, the Board had dismissed a labor organization's representation petition in view of a "long-standing policy not to exercise jurisdiction over the hotel industry." The labor organization then commenced an action in the United States District Court for the District of Columbia (147 F. Supp. 306) alleging jurisdiction under, *inter alia*, the Fifth Amendment. The district court granted the Board's motion for summary judgment but did not dismiss for lack of jurisdiction. The Court of Appeals affirmed without opinion. 249 F. 2d 506 (D.C. Cir. 1957).

The decision of the Supreme Court to reverse in *Hotel Employees* was brief and did not make reference to jurisdiction. However, jurisdiction must have been based on Constitutional grounds since the Court had the case of *Leedom* v. *Kyne* before it for decision when the *Hotel Employees'* decision was issued.[15] Nonetheless, it did not consider jurisdiction on a *Leedom* v. *Kyne* basis, leaving only Constitutional grounds as a basis for jurisdiction.

As in *Hotel Employees*, the Board's decision in this case has eliminated an entire class of employers—U.S. employers operating in the Canal Zone—from its jurisdiction, although the Board has conceded that statutory jurisdiction exists.

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[15] The *Hotel Employees'* case was argued before the Court on November 10, 1958 and decided on November 24, 1958. *Leedom* v. *Kyne* was argued October 23, 1958 and decided December 15, 1958.

Certiorari should issue in this case to resolve the important Constitutional questions herein presented which also impact on the administration of national labor policy and whether employers and petitioning labor organizations are to be treated equally under this policy.

CONCLUSION

For all the foregoing reasons it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

ABRAHAM E. FREEDMAN
Counsel for Petitioner
346 West 17th Street
New York, New York 10011

APPENDIX

Letterhead of National Labor Relations Board

January 26, 1971

Certified Mail No. 778303
Return Receipt Requested

National Maritime Union of
America, AFL-CIO
36 Seventh Avenue
New York, N. Y. 10011

Re: Contract Services Inc.
Case No. 4-RC-8995

Gentlemen:

The above-captioned case, petitioning for an investigation and certification of representatives under Section 9(c) of the National Labor Relations Act, has been carefully investigated and considered.

As a result of the investigation, I find and conclude that further proceedings are not warranted. The Employer's operation involved in this petition is located in the Canal Zone, all school busing service is performed in the Canal Zone, and all employees sought by Petitioner are Panamanian nationals. The facts of this case are similar to those in *United Fruit Company,* 159 NLRB 135 enf'g., *National Maritime Union* v. *NLRB* 267 F. Supp. 117 (D.C. S.D.N.Y., 1967) which the Board decided not to assert jurisdiction. Further, the dismissal of your identical petition, 4-RC-8302, filed in 1969, was sustained by the Board because it concluded that there were no compelling reasons for departure from the *United Fruit* Company precedent. Accordingly, I am dismissing the petition in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the National Labor Relations Board, Washington, D.C. 20570. A copy of such appeal must be

Letterhead of National Labor Relations Board

served upon each of the other parties to the proceeding, including the undersigned. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal (8 copies) should be filed with the Board in Washington, D.C. 20570 by the close of business February 8, 1971 except that the Board may, upon good cause shown, grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

Very truly yours,

Bernard Samoff
BERNARD SAMOFF
Regional Director

See attached sheet

January 26, 1971

Re: Contract Services Inc.
Case No. 4-RC-8995

cc: Contract Services Inc.
P.O. Box 2025
Curundu, Canal Zone

Corporation Service Co.
Attn: Charles Ernest
Delaware Trust Bldg.
Wilmington, Delaware

Stanley Gruber, Esquire
36 Seventh Avenue
New York, N.Y. 10011

Arnold Ordman, General Counsel
National Labor Relations Board
Washington, D.C. 20570

Letterhead of National Labor Relations Board

March 10, 1971

Re: Contract Services, Inc.
Case No. 4-RC-8995

Abraham E. Freedman, Esq.
36 Seventh Avenue
New York, New York 10011

Dear Mr. Freedman:

The Board has carefully considered your Request for Review of the Regional Director's dismissal of the petition in the above case and concluded that the appeal advances no compelling reasons for departing from the decision in *United Fruit Company*, 159 NLRB 135. Accordingly, the Regional Director's dismissal of the petition, based on that decision, was warranted.

Very truly yours,

Robert Volger
ROBERT VOLGER
Associate Executive Secretary

cc: Bernard Samoff, Director
Region 4—Philadelphia—Pennsylvania

Contract Services, Inc.
P.O. Box 2025
Curundu, Canal Zone

Corporation Service Co.
Attn: Charles Ernest
Delaware Trust Building
Wilmington, Delaware

Amended Complaint

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-881

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

against

NATIONAL LABOR RELATIONS BOARD AND BERNARD L. SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,

Defendants.

Plaintiff, NATIONAL MARITIME UNION OF AMERICA, AFL-CIO (hereinafter referred to as "the Union"), brings this action against the NATIONAL LABOR RELATIONS BOARD (hereinafter referred to as "the Board"), and BERNARD L. SAMOFF, Regional Director of the Fourth Region of the National Labor Relations Board (hereinafter referred to as "the Regional Director"), seeking to compel the Board to assert jurisdiction over a question of representation affecting commerce and to direct a representation hearing upon the following statement of facts:

1. Plaintiff, National Maritime Union of America, AFL-CIO, is an unincorporated association, having its principal offices in the City, County and State of New York, and is a labor organization as defined in Section 2(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 151, et seq.

2. The National Labor Relations Board is the agency charged with the responsibility by law, under the Labor-Management Relations Act of 1947, 29 U.S.C. 151 et seq., to receive representation petitions from individuals and unions and to conduct elections in connection therewith as speedily as may be possible.

3. Bernard L. Samoff is the Regional Director and agent for the Fourth Region of the National Labor Relations Board with offices at Juniper and Walnut Streets, Philadelphia, Pennsylvania.

4. Jurisdiction is conferred on this Court by 28 U.S.C. 1337, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce", without regard to the citizenship of the parties or the amount in controversy, and by 29 U.S.C. 159.

5. This action arises under the Labor-Management Relations Act of 1947, 29 U.S.C. 151 et seq., and also under the Administrative Procedure Act of 1946, 5 U.S.C. 1001, et seq. Sections 10(a) (b) (c) and (e).

6. Contract Services, Inc. is a corporation organized and existing under the laws of the State of Delaware, and operates a fleet of school buses in the Canal Zone, pursuant to a service contract with the U.S. Navy to provide school bussing service for children of government personnel in the Canal Zone.

7. On and before January 12, 1971, a majority of the bus drivers, mechanics, dispatchers and related personnel employed by Contract Services, Inc. in the Canal Zone designated the Union to represent them for purposes of collective

bargaining and otherwise dealing with that employer, and submitted pledge cards to support their intentions.

8. On or about January 12, 1971, the Union filed a petition for certification of representatives with the Regional Director of the Board for the Fourth Region, alleging that the required number of employees in the aforementioned unit desired to be represented for purposes of collective bargaining by the Union, and the Union desired to be certified as the representative of these employees, pursuant to Section 9 of the Labor-Management Relations Act of 1947, 29 U.S.C. 159.

9. Said petition was docketed as 4-RC-8995 by the Regional Director of the Board for the Fourth Region.

10. On January 26, 1971, the Regional Director issued a Decision letter in the aforesaid representation proceeding dismissing the Union's petition without a hearing. In the aforesaid Decision letter the Regional Director concluded that the facts underlying the petition were similar to those in *United Fruit Company,* 159 NLRB 135, in which the Board deemed it inappropriate to assert jurisdiction over certain Canal Zone operations of the United Fruit Company.

11. The Union appealed the Decision of the Regional Director to the Board, and on March 10, 1971, the Board affirmed the Decision of the Regional Director on the ground that there were "no compelling reasons for departing from its decision in *United Fruit Company,* 159 NLRB 135 to defer consideration of the question of whether jurisdiction exists and should be asserted over an employer's operations in the Canal Zone, pending completion of negotiations

between Panama and the United States concerning the question of sovereignty over that area." A copy of the Board's decision is annexed hereto as Exhibit "A".

12. Under the Treaty executed between the United States and the Republic of Panama in 1903, which has not been abrogated and is still in full effect, the United States has full sovereignty over the Canal Zone.

13. In refusing to assert jurisdiction in the aforesaid proceeding in reliance upon the proposed terms of a new treaty which has neither been executed nor ratified, and which may never be executed or ratified, the Board has exceeded its jurisdiction and improperly invaded the field of foreign relations.

14. In refusing to assert jurisdiction in the aforesaid proceeding, the Board has refused to comply with the "commerce" definition set forth in Section 2(6) of the Act and has failed and refused to comply with Section 9(c)(1) of the Act.

15. In dismissing the Union's petition without affording the Union a hearing to present evidence on the status of the treaty negotiations between the Republic of Panama and the United States the Regional Director and the Board acted in violation of Section 102.63(a) of the Board's Rules and Regulations and acted arbitrarily, capriciously and not in accordance with law.

16. In refusing to assert jurisdiction in the aforesaid proceeding, the Board has ignored its own prior decisions wherein it has asserted jurisdiction in cases involving employers located in the Canal Zone, and, thereby has acted arbitrarily, capriciously and not in accordance with law.

17. In refusing to assert jurisdiction in the aforesaid case, and in refusing to direct a representation election for certification as aforesaid, the defendants have exceeded the scope of their statutory authority and have failed and refused to comply with the provisions of Sections 9(b) and (c) of the Act, thereby acting arbitrarily, capriciously and in violation of the law.

18. By declining to assert jurisdiction over an entire class of employers—namely, all United States employers doing business in the Canal Zone—the defendants have deprived the Union and its members of their constitutional rights under the First and Fifth Amendments of the United States Constitution.

19. In dismissing the Union's petition without holding a hearing defendants have deprived the Union and its members of due process under the First and Fifth Amendments of the United States Constitution.

20. By reason of the foregoing wrongful acts, plaintiff Union has been, is now and will be in the future denied the right to be certified as exclusive bargaining representative for the aforesaid employees of Contract Services Inc. in the Canal Zone as well as to seek certification in cases involving all United States employers doing business in the Canal Zone. Further, the employees of said employers will be deprived of their right to select a representative of their own choice, and, particularly, will be deprived of the right to bargain with their employer through representatives of their own choice.

WHEREFORE, plaintiff Union prays that an Order be entered directing the defendants to assert jurisdiction over

the within matter and to direct the holding of a representation hearing in conformity with the provisions of the Labor-Management Relations Act of 1947, 29 U.S.C. 151 et seq., and for such other and further relief as to the Court may seem appropriate.

FREEDMAN, BOROWSKY & LORRY

By .....
Attorney for Plaintiff
Office & P.O. Address
Lafayette Building
Chestnut Street at Fifth
Philadelphia, Pennsylvania

To: MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

Attention: GLEN M. BENDIXSEN
Chief of Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570

Co-counsel: DONALD W. SAVELSON

and

LEONARD LEVENTHAL, Regional Atty.
Region 4
1700 Bankers Securities Bldg.
Philadelphia, Pa. 19107

Attorneys for National Labor
Relations Board

Memorandum and Order

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action—No. 71-881

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

v.

NATIONAL LABOR RELATIONS BOARD AND BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

November 9th

MASTERSON, *J.*

On April 14, 1971, the National Maritime Union of America (N.M.U.) filed a complaint in this court seeking injunctive relief compelling the National Labor Relations Board (N.L.R.B.) and Bernard Samoff, its Regional Director for the Fourth Region to assert jurisdiction over a question of representation and to conduct an appropriate representation hearing pursuant to Section 9(c)(1) of the National Labor Relations Act, as amended.[1] The

[1] 29 U.S.C. § 159(c)(1). That statute reads in pertinent "Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board

* * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . . If the Board find upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results.

defendants have moved to dismiss under Rule 12(b) alleging that this court lacks jurisdiction to grant the requested relief.

The relevant facts may be summarized as follows. On January 26, 1971, the Regional Director issued a decision letter dismissing the union's petition following an investigation but without holding a hearing. The Regional Director predicated his action on the Board's decision in *United Fruit Company,* 159 N.L.R.B. 135 (1966) in which the Board declined to assert jurisdiction over United Fruit's Canal Zone operations. On Appeal, the Board, by decision dated March 10, 1971, affirmed the Regional Director on the ground that there were "no compelling reasons for departing from its decision in *United Fruit* to defer consideration of the question of whether jurisdiction exists and should be asserted over an employer's operations in the Canal Zone, pending completion of negotiations between Panama and the United States concerning the question of sovereignty over that area."

In *United Fruit Company,* supra, N.M.U. sought certification as the collective bargaining representative of Panamanian Nationals employed by United Fruit Company at its shipping terminals in the Canal Zone. The Board dismissed the petition without reaching the question of its statutory jurisdiction over the employer's Canal Zone operation. Instead, the Board found it inappropriate to assert jurisdiction in light of a document issued by the White House on the status of treaty negotiations with the Republic of Panama. Relying entirely on this document the Board noted that the United States and Republic of Panama:

> ". . . are currently negotiating the terms of a new treaty to replace the 1903 treaty and its amend-

> ments, which will govern the relationship between them with respect to the area of the Canal Zone. The President of the United States has announced that the two countries have already agreed that the 1903 treaty will be abrogated; that the new treaty will effectively recognize Panama's sovereignty over the area of the present Canal Zone . . ."

In this case, counsel for the Board has indicated that in addition to the statement by the White House mentioned above, the Board also considered the fact that President Nixon recently met with Panamanian President Loka, reviewed the treaty situation between the two countries and indicated that the United States was ready to resume negotiations for a new treaty. See *New York Times*, October 25, 1970 at page 1. On the basis of these two facts, counsel contend that the Board had discretion to decline jurisdiction under the rationale of *McCullough* v. *Sociedad Nacional*, 372 U.S. 10 (1963). In that case, the Supreme Court held that the Board's assertion of jurisdiction to determine representation of foreign seamen aboard vessels under foreign flags was reviewable by the District Court because it aroused vigorous protests from foreign governments and created international problems for our government. Although this case is distinguishable from *McCullough* in that here the Board has declined to assert jurisdiction, and therefore we have a "final order" before us; nevertheless, apart from the precise holding of *McCullough*, the effect of its actions on foreign relations *may* be a valid factor for the Board to consider in reaching its decision.

But we do not and need not decide this issue just yet because at this stage of the proceedings, we are unable to

determine whether the Board had *any* evidence that the assertion of jurisdiction in this case would upset United States-Panamanian relations. The presidential communique of 1965 and the New York Times article standing alone are insufficient without some evaluation by experts within the executive branch. Moreover, there is no evidence at all to indicate that Panamanian officials would seriously oppose an assertion of jurisdiction by the Board. Consequently, we will hold a hearing on December 3, 1971 at 10 A.M. to determine (1) whether the effect on foreign relations is a valid factor under 29 U.S.C. § 159 for the Board to consider in deciding to decline jurisdiction; (2) if so, whether the assertion of jurisdiction would adversely effect the United States-Panamanian relations; (3) whether the Canal Zone is a state, foreign country or territory within definition of commerce in the Act;[2] (4) whether there are any other reasons why the court should decline to order the N.L.R.B. to comply with its alleged statutory duties in this case.

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[2] Section 2(6) of the Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any state, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country." 296 U.S. 152(6).

Order of November 9, 1971

ORDER

AND NOW, this 9th day of November, 1971, it is ORDERED that defendant's motion to dismiss is DENIED WITHOUT PREJUDICE pending an evidentiary hearing scheduled for December 3, 1971.

s/ THOMAS MASTERSON, U.S.D.J.

Stipulation to Postpone Proceedings

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-881

—o—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD and BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,
Defendants.

—o—

The Board having issued an order, attached hereto as an Appendix, reinstating plaintiff's election petition and directing a hearing on the petition, the parties stipulate as follows:

1. that, subject to the views which plaintiff will promptly submit to the Court hereafter, the parties agree that the

order entered by the Board warrants postponement by the Court of any further proceedings pending completion of the proceedings before the Board;

2. that in view of the above, the parties agree that, subject to the Court's approval, the time of defendants National Labor Relations Board and Bernard Samoff, Regional Director, to plead to the complaint is continued indefinitely or until further notice by the Court, and that the evidentiary hearing scheduled in this matter for January 17, 1972, is cancelled;

3. attorneys for plaintiff, National Maritime Union, have authorized the Board to affix their signatures to this stipulation.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relation Board

By GLEN M. BENDIXSEN .....
Glen M. Bendixsen
Chief of Special Litigation
Washington, D. C. 20570
Telephone: (202) 382-5401
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Order

Curundu,
Canal Zone

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 4-RC-8995

CONTRACT SERVICES, INC.

Employer,

and

NATIONAL MARITIME UNION OF AMERICA,[1] AFL-CIO

Petitioner.

On January 11, 1971, the NMU filed a petiiton for certification of representative in the above-entitled proceeding with the Regional Director for Region 4 of the National Labor Relations Board, seeking to represent a unit of bus drivers, mechanics, dispatchers and related personnel employed in the Canal Zone by the Employer. After an administrative investigation, the Regional Director by letter dated January 26, 1971, concluded that further proceedings were not warranted and dismissed the petition, noting, *inter alia,* that the Employer's operation is located in the Canal Zone, that all the employees sought to be represented by the NMU are Panamanian nationals, and that the facts are similar to those in *United Fruit Company,* 159 NLRB 135, direct review denied, *National Maritime Union* v. *N.L.R.B.,* 267 F. Supp. 117 (S.D.N.Y.), in which the Board

[1] Hereinafter referred to as the NMU.

decided not to assert jurisdiction. By letter dated January 27, 1971, NMU appealed from the Regional Director's dismissal of the petition, requesting that the Board remand the matter to the Regional Director for an appropriate hearing. The Board, by letter dated March 10, 1971, denied the NMU's appeal, stating that there were no compelling reasons for departing from its decision in *United Fruit.*

Thereafter, the NMU filed a complaint with the United States District Court for the Eastern District of Pennsylvania, seeking an order compelling the Board to conduct an election or, in the alternative, to conduct a hearing in the matter. The General Counsel filed a motion to dismiss the complaint. On November 9, 1971, the Court issued a Memorandum and Order,[2] denying the General Counsel's motion and directing a hearing before the Court to determine (1) whether the effect on foreign relations is a valid factor for the Board to consider in deciding to decline jurisdiction; (2) if so, whether the assertion of jurisdiction would adversely affect the United States-Panama relations; (3) whether the Canal Zone is a state, foreign country or territory within the definition of commerce in the National Labor Relations Act, as amended; and (4) whether there are any other reasons why the Court should decline to order the Board to comply with its alleged statutory duties in this case.

The Board, having duly considered the matter, has decided to reconsider its decision to deny the NMU's appeal, grant the appeal, and order a hearing in order that the Board may articulate its position on the issues raised by the Court. Accordingly,

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[2] *National Maritime Union of America, AFL-CIO* v. *N.L.R.B. and Bernard L. Samoff, Regional Director, Region 4,* Civil Action No. 71-881.

Order

IT IS HEREBY ORDERED that the Board's letter dated March 10, 1971, denying NMU's appeal be, and it hereby is, revoked.

IT IS FURTHER ORDERED that the NMU's appeal from the Regional Director's dismissal of the petition be, and it hereby is, granted, and that the petition for certification of representative filed by the NMU in this case on January 11, 1971, be, and it hereby is, reinstated.

IT IS FURTHER ORDERED that the above-entitled proceeding to, and it hereby is, referred to the Regional Director for Region 4 for the conduct of a hearing in accordance with Section 101.20 of the Board's Rules and Regulations, Series 8, as amended, and that, upon the conclusion of such hearing, the Regional Director shall transfer the case to the Board for decision.

Dated, Washington, D. C., December 10, 1971.

By direction of the Board:

OGDEN W. FIELDS
Executive Secretary

Decision and Order

202 NLRB No. 156

D—7147
Curunda, Panama
Canal Zone

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 4—RC—8995

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CONTRACT SERVICES, INC.

Employer

and

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

Petitioner

———0———

On January 11, 1971, the National Maritime Union of America, AFL-CIO (herein called the NMU), filed a petition with the Regional Director for Region 4 seeking an election in a unit of certain employees employed by the Employer in its bus transportation operation in the Panama Canal Zone (herein called the Canal Zone). All of the employees in the proposed unit are Panamanian nationals. After the petition was filed the Regional Director administratively dismissed the petition in reliance on *United Fruit Co.*,[1] and the Board sustained the dismissal.

Thereafter, on April 14, 1971, NMU filed suit in the United States District Court for the Eastern District of

[1] 159 NLRB 135, direct review denied, *National Maritime Union of America* v. *N.L.R.B.*, 267 F.Supp. 117 (D.C.N.Y.).

Pennsylvania seeking review of the Board's decision in declining to assert jurisdiction and an order directing the Board to conduct a hearing in the matter. Subsequently, the General Counsel filed a motion to dismiss the complaint on the grounds that the district court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim on which relief should be granted. The court, on November 9, 1971, issued a memorandum and order denying, without prejudice, the Board's motion to dismiss the NMU's complaint and ordering a hearing before the Court to determine (1) whether the effect on foreign relations is a valid factor for the Board to consider in deciding to decline jurisdiction; (2) if so, whether the assertion of jurisdiction would adversely affect the United States-Panamanian relations; (3) whether the Canal Zone is a state, foreign country, or territory within the definition of commerce in the National Labor Relations Act, as amended; and (4) whether there are any other reasons why the Court should decline to order the Board to comply with its alleged statutory duties in this case.

After the Court issued its order, the Board reconsidered its decision denying NMU's appeal from the Decision of the Regional Director and, by order dated December 10, 1971, the Board reinstated the petition. Moreover, so that it could articulate its position on the issues raised by the Court, the Board directed a hearing which was held before Hearing Officer Solomon S. Spector on April 4, 1972. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Pursuant to the Board's Rules and Regulations, the case was thereafter transferred to the Board for decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor

Relations Board has delegated its authority in this proceeding to a three-member panel.

The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Upon the entire record in this case, including the briefs filed with the Board by the Employer and the Petitioner, the Board, for the reasons set forth hereinafter, answers in the affirmative each of the foregoing questions posed by the court with the exception of the last question which we find unnecessary to reach in light of our decision to decline to exercise jurisdiction at this time based upon foreign policy considerations.[2]

The Employer, a Delaware corporation, is engaged in the operation of a local bus system transporting U.S. military dependents to and from school within the Canal Zone, pursuant to a fixed-cost contract with the U.S. Navy for a 5-year period.[3] The current contract is effective from August 1, 1971. The dollar volume of such service exceeds $250,000 per annum. All buses and related equipment used by the Employer pursuant to the current contract are purchased from continental United States and exceed $50,000 in value per annum. It is clear from the above that the

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[2] In addition to declining to assert jurisdiction because of foreign policy considerations, Member Kennedy would also decline jurisdiction based on the fact that the Board has consistently refused to assert jurisdiction over school bus enterprises. *S. L. Lines, Inc., d/b/a Pacific-Scenic-Lines*, 164 NLRB 1179; *Community Enterprises, Inc., d/b/a Community Charter Bus System*, 164 NLRB 1186; *Brothers Coach Corp.*, 158 NLRB 931; *Camp Baumann Buses, Inc. and V.S. Buses, Inc.*, 142 NLRB 648; *Raybern Bus Service, Inc.*, 128 NLRB 430. Thus, in accordance with the foregoing cases, he would not assert jurisdiction over such enterprises in the Canal Zone.

[3] The Employer's only other enterprise, also conducted solely in the Canal Zone, is under a 3-year contract with the U.S. Army to perform environmental testing.

Employer's volume of business, purchases, and relationship to our national defense bring it within our standards for the assertion of jurisdiction.[4]

The Employer, however, contends that the Board should not assert jurisdiction over its transportation enterprise in the Canal Zone. In support of its position the Employer argues (1) that the Canal Zone is not a "territory" within the "commerce" definition of the National Labor Relations Act, as amended, and (2) that, in any event, the Board should adhere to its decision in *United Fruit, supra,* and decline to assert jurisdiction so as not to interfere with international affairs involving United States-Panamanian relations. Accordingly the Employer requests that the petition be dismissed.

Legislative history does not shed any light on whether business operations conducted by U.S. employers in the Canal Zone are to be included within the meaning of "commerce" as that term is defined by Section 2(6) of the National Labor relations Act.[5] Reference is made to Puerto

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[4] *Charleston Transit Company,* 123 NLRB 1296; *Siemons Mailing Service,* 122 NLRB 81. But for such services the U.S. Navy might be obligated to use military personnel to fulfill such tasks instead of other essential duties pertaining to the maintenance, operation, and protection of the Panama Canal. See *Geronimo Service Co.,* 129 NLRB 366.

[5] Section 2(6) of the Act provides that:

> The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Rico,[6] the Virgin Islands,[7] and Guam[8] in Section 14(c) of the Act[9] as examples of territories, but such reference is not meant to be exhaustive.[10] Thus, the Board and the courts have interpreted the term "Territory" as used in the Act to include not only Puerto Rico, the Virgin Islands, and Guam but also, before statehood, Alaska[11] and Hawaii.[12]

In *Star-Kist Samoa, Inc., supra,* the Board found that American Samoa is not a "Territory," relying particularly on the fact that Congress has not established any form of self-government for American Samoa, that is to say, American Samoa is not an "organized" territory.[13] However, we note that the Canal Zone, unlike American Samoa, possesses a highly organized form of self-government which was

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[6] See *Ronrico Corporation,* 53 NLRB 1135.

[7] See *Caribe Lumber and Trading Corp.,* 148 NLRB 277.

[8] See *RCA Communications, Inc.,* 154 NLRB 34.

[9] Sec. 14(c)(2) of the Act provides that:

> Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction.

[10] See *Star-Kist Samoa, Inc.,* 172 NLRB No. 161.

[11] *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.,* 342 U.S. 237.

[12] *American Factors, Ltd. (Hilo Branch),* 104 NLRB 199, and *Pacific Laundry Co., Ltd.,* 99 NLRB 1011.

[13] We note, in passing, the Supreme Court's decision in *U.S.* v. *Standard Oil of California,* 404 U.S. 558, rehearing denied 405 U.S. 969, wherein the Court held that American Samoa was a "Territory" within the meaning of Sec. 3 of the Sherman Act (15 U.S.C. § 3) since both organized and unorganized "Territories" are within the meaning of that term as used in the Sherman Act.

initially established by the Panama Canal Act of 1912.[14] Laws of the Canal Zone were incorporated into the Canal Zone Code which was adopted by Congress in 1934 and revised effective January 2, 1963.[15] Under the Canal Zone Code, a governor appointed by the President as his designee is empowered with "official control and jurisdiction" over the Canal Zone and performs "all duties in connection with the civil government of the Canal Zone. . . .[16] A system of Magistrate's Courts is established with its own rules of procedure and provision for appeal to the United States District Court for the District of the Canal Zone.[17] This Federal district court is imbued with all the powers of any U.S. district court and appeals from the district court are within the jurisdiction of the United States Court of Appeals for the Fifth Circuit.[18]

Although we are mindful of provisions of the Canal Zone Code, the body of law enacted by Congress to govern the Canal Zone, we find no specific provision of the Canal Zone Code, nor do we find any other specific delegation by Congress to the Canal Zone government, which pertains to matters covered by our Act. In the absence of such provision or delegation we must assume, at least, that Congress intended no specific exemption from "commerce" of the operations of U.S. employers in the Canal Zone.

On the other hand, we note no specific inclusion of the Canal Zone as being covered by our Act, as is found, for

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[14] 37 Stat. 560.

[15] 76A Stat. 1.

[16] 2 Canal Zone Code § 33.

[17] 5 Canal Zone Code § 711 et seq.

[18] See 28 U.S.C. §§ 1404, 1406, 1869, and 28 U.S.C. § 41.

example, in the Fair Labor Standards Act,[19] the Labor-Management Reporting and Disclosure Act,[20] the Welfare and Pension Plans Disclosure Act,[21] and the Equal Employment Opportunity Act.[22] In these circumstances, we conclude that while there is no specific evidence of congressional intent, nevertheless business operations conducted in the Canal Zone by U.S. employers appear to fall within the definition of the term "commerce" as defined in the National Labor Relations Act, Section 2(6), and we believe, therefore, that we have the statutory authority to assert jurisdiction.

This Board, however, has the discretionary power to decline to exercise its statutory jurisdiction to the fullest extent.[23] Such discretion has been recognized by the Supreme Court when it stated in *Denver Building and Construction Trades Council*, "[e]ven when the effect of activities on . . . commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction

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[19] 29 U.S.C. § 213(f). See, e.g., *James* v. *Contract Services, Inc.*, Civil No. 6725, U.S. District Court for the District of the Canal Zone, Balboa, Division, December 23, 1969, wherein the Employer herein was the subject of an action brought for its failure to comply with the terms of the FLSA.

[20] 29 U.S.C. § 402(b).

[21] 29 U.S.C. § 302(a)(9).

[22] 42 U.S.C. § 2000e(i).

[23] See, e.g., *N.L.R.B.* v. *Denver Building and Construction Trades Council [Gould & Preisner]*, 341 U.S. 675, 684 (1951); *N.L.R.B.* v. *WGOK, Inc.*, 384 F.2d 500, 502 (C.A. 5, 1967); *N.L.R.B.* v. *Jones Sausage Company*, 257 F.2d 878, 880 (C.A. 4, 1958); *N.L.R.B.* v. *W. B. Jones Lumber Company, Inc.*, 245 F.2d 388, 390-391 (C.A. 9, 1957).

in that case." [24] In declining to act in such cases the Board is merely exercising its "complete discretionary power to determine in each case whether the public interest requires it to act."[25] Moreover, the Board has continually exercised this discretion, with judicial approval, and has declined to assert jurisdiction in certain representation as well as unfair labor practice cases. Thus, even though a petition has been filed alleging that a question concerning representation affecting commerce exists, the Board has declined to exercise jurisdiction where employees of foreign nationalities and international considerations are involved.[26] As the court in *N.M.U.* v. *N.L.R.B.* stated, "the opinion of the Supreme Court in *McCulloch* v. *Sociedad Nacional* [372 U.S. 10] makes it perfectly clear that considerations of international relations are highly relevant—indeed, indispensable—in determining the extent of the Board's jurisdiction. This court perceives no reason why such considerations are not equally relevant to the Board's determination whether to assert jurisdiction." [27] Inasmuch as we agree with the court's interpretation of *McCulloch* v. *Sociedad Nacional, supra,* and in agreement with prior Board decisions, we hold that in deciding whether or not to exercise our discretion to assert jurisdiction herein, the effect thereof on foreign relations is a necessary and proper factor to be considered.

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[24] *Id.,* 341 U.S. at 684.

[25] *N.L.R.B.* v. *Newark Morning Ledger Company,* 120 F.2d 262, 268 (C.A. 3, 1941).

[26] *United Fruit, supra,* fn 1; and see *British Rail-International, Inc.,* 163 NLRB 721 (1967).

[27] *Supra,* fn. 1, 267 F.Supp. at 126.

In determining whether the assertion of jurisdiction herein would adversely affect United States-Panamanian relations, we note that the issue of Panamanian sovereignty over the Canal Zone has long been a sensitive topic of negotiations between the two governments. In 1903 the United States negotiated a treaty which ceded to the United States the right in perpetuity to maintain, operate, and defend a canal in Panama and the right to act in the 10-mile strip surrounding the canal with "all the rights, power and authority" which "it would possess and exercise if it were the sovereign."[28] Thus, the United States use of the Canal Zone and jurisdiction there are treaty rights which may be modified or terminated by another treaty with Panama. We noted in 1966 in *United Fruit Company*[29] that the United States and Panama were at that time "negotiating the terms of a new treaty, to replace the 1903 treaty and its amendments, which will govern the relationship between them with respect to the area of the Canal Zone. The President of the United States has announced that the two countries have already agreed that the 1903 treaty will be abrogated; that the new treaty will effectively recognize Panama's sovereignty over the area of the present Canal Zone. . . ." It was the existence of those negotiations and the legitimate and prudent concern that such negotiations might be disturbed that led the Board in *United Fruit, supra,* to deem it inappropriate to assert jurisdiction at that time. The Board's decision was fully upheld by the Federal district court.[30] The negoti-

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[28] Art. III of Convention for the Construction of a Ship Canal, 33 Stat. 2234, TS 431

[29] 159 NLRB 135, 136

[30] *National Maritime Union* v. *N.L.R.B.*, 267 F.Supp. 117 (1967)

ations, which began in 1964, resulted in the initialing of three draft treaties in 1967. After neither government took any action to have the treaties ratified, further negotiations came to a halt.

Intensive negotiations for a new Panama Canal treaty to replace the treaty of 1903 resumed in June of 1971.[31] Although by year's end all major treaty issues had been explored, it was contemplated that agreement would require further intensive negotiation. To this end congressional subcommittees held hearings on the negotiations, giving rise to considerable criticism in Panama of some of the views expressed. In appearing before the Subcommittee on the Panama Canal of the House Committee on Marchant Marine and Fisheries on November 29, 1971, then U.S. Ambassador Mundt stated[32] that "Panama seeks the application of its laws to various activities in the present Canal Zone. Certain jurisdictional rights and activities, including commercial operations, not necessary for the administration, operation and defense of the canal, can be transferred to Panama without adversely affecting the United States interests. . . . There is widespread support in Latin America," he noted, "for Panama's efforts to obtain greater practical exercise of its sovereignty and to terminate the objectionable aspects of the U.S. presence in the Canal Zone, which," he stated, "is exactly one of the U.S. objectives in the current negotiations." Negotiations

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[31] See *Report of the Secretary of State, United States Foreign Policy 1971* (Department of State Publication 8634) at 149 (March 1972).

[32] Vol. LXV, No. 1696, Department of State Bulletin (December 27, 1971) at pp. 734-735; Department of State Press Release "Information On Panama Canal Treaty Negotiations," January 12, 1972, at p. 2.

were being conducted at the time when Ambassador Mundt was making his statement before the House Committee. Thereafter, between June 1971 and January 1972, negotiators have held some 40 formal negotiating sessions in addition to a number of subcommittee meetings.[33] Moreover, we are presently advised by the Office of Interoceanic Canal Negotiations of the United States State Department that the negotiations are continuing.

In light of the foregoing facts, we are of the opinion that we ought not at this time reach out to inject further U.S. governmental regulation of matters affecting Panamanian citizens employed in the Canal Zone, when the entire matter of the scope and effect of this country's presence in that zone is a matter undergoing international negotiations. To assert jurisdiction for the first time in this Board's history at this particular juncture would be to risk a negative impact on negotiations. Having refrained thus far from exercising the full extent of our statutory jurisdiction by asserting jurisdiction in this distant area, we see no compelling reason to do so now, and have no desire to take any action which might be a factor in jeopardizing the prospects for a negotiated settlement of the respective rights and duties of the United States and the Panamanian government with respect to Canal Zone matters.

Based upon the foregoing, we conclude that the Canal Zone is a state, foreign country, or territory within the definition of "commerce" as defined by Section 2(6) of the National Labor Relations Act, but that it would not effectuate the policies of the Act to assert jurisdiction in

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[33] Department of State Press Release "Information on Panama Canal Treaty Negotiations," January 12, 1972, at p. 4.

the instant case since such action might at this time adversely affect United States-Panamanian relations. Accordingly, we shall dismiss the petition.

It is hereby ordered that the petition in Case 4—RC—8995 be, and it hereby is, dismissed.

Dated, Washington, D.C.

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Edward B. Miller, Chairman

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Ralph E. Kennedy, Member

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John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Opinion and Order

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—o—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

—vs—

NATIONAL LABOR RELATIONS BOARD AND BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,

Defendants.

—o—

FOGEL, *J.* May 6, 1974.

This is an action brought by the National Maritime Union of America, AFL-CIO (hereinafter the Union) against the National Labor Relations Board (hereinafter the Board) and its Regional Director, to compel the Board to reinstate the petition, assert jurisdiction, and order a representation election in Contract Services, Inc. (Case No. 4-RC-8995).

The Board has filed a motion to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure, asserting *First:* that this Court has no jurisdiction over the subject matter of the action, and *Second:* that the complaint fails to state a claim upon which relief can be granted.

The case presents the following issue for determination: Does a United States District Court have jurisdiction to compel the Board to order a representation election pur-

suant to § 9(c) of the National Labor Relations Act, as amended (hereinafter the Act), 49 Stat. 453, 61 Stat. 143, 29 U.S.C. § 159(c), when the Board has determined after a hearing that statutory jurisdiction over the enterprise exists, but has declined to exercise this statutory jurisdiction on the ground that it would adversely affect the foreign relations of the United States?

The procedural history of the case may be summarized as follows:

On January 11, 1971, the Union filed an election petition with the Regional Director of the Fourth Region of the Board, seeking a representation election among a unit of bus drivers, mechanics, dispatchers, and related personnel employed by Contract Services, Inc., in the Panama Canal Zone. The Regional Director dismissed the petition without a hearing, relying on the Board's decision in United Fruit Company, 159 NLRB 135 (1966), direct review denied, National Maritime Union v. NLRB, 267 F.Supp. 117 (S.D.N.Y. 1967). The Union appealed the dismissal of the petition by the Regional Director; however, the Board denied the appeal and held that there was no compelling reason to depart from its decision in *United Fruit*, in which it had declined to assert jurisdiction in a matter involving attempted unionization of clerical employees of the United Fruit Company in the Panama Canal Zone because of negotiations between the governments of Panama and of the United States relating to future Panamanian sovereignty over the zone.

The Union thereupon instituted this action in the District Court, seeking to compel the Board to order a representation election, or, in the alternative, to compel it to conduct a hearing on the Union's election petition. The Board filed a motion to dismiss the complaint.

Opinion and Order

On November 9, 1971, this Court, per an Order of my former colleague, Judge Masterson, denied the motion to dismiss without prejudice and directed that a hearing be held to determine: *First:* whether the effect on foreign relations is a valid factor for the Board to consider in declining to assert jurisdiction in the Canal Zone; *Second:* if so, whether the assertion of jurisdiction would adversely affect relations between the United States and Panama; *Third:* whether the Canal Zone is a state, foreign country or territory within the definition of commerce in § 2(6) of the Act; and *Fourth:* whether there were any other reasons why the Court should decline to order the Board to conduct a hearing or an election in the mattter.

Because the Board reconsidered its dismissal of the Union's petition, and remanded the case to the Regional Director for a hearing, the necessity for a hearing in the District Court was obviated. Pursuant to a stipulation entered into by the parties, the proceedings in this Court were stayed pending action by the Board.

On April 4, 1972, Hearing Officer Solomon S. Spector conducted a hearing and the record was thereafter transmitted to the Board for determination under § 9(c)(1) of the Act. On April 3, 1973, a three-member panel of the Board rendered a decision and once again dismissed the petition of the Union. Contract Services, Inc., 202 NLRB No. 156 (1973).

The Board found that the employer is a Delaware corporation, engaged in the operation of a local bus system transporting U.S. military dependents to and from school within the Canal Zone, on a five-year fixed cost contract with the U. S. Navy, which contract had been in effect since August 1, 1971. The Board further found that the annual dollar volume of services exceeded $250,000.00, and that

annual equipment purchases from the continental United States exceeded $50,000.00. Hence, the Board concluded that "the Employer's volume of business, purchases, and relationship to our national defense bring it within our standards for the assertion of jurisdiction." *Contract Services, supra,* at p. 3 (slip opinion). Moreover, the Board also concluded that business operations by U. S. employers in the Panama Canal Zone were included within the definition of "commerce" in § 2(6) of the Act, thus vesting the Board with the requisite statutory authority to assert jurisdiction over the matter. Notwithstanding these findings, however, the Board declined to assert jurisdiction because it concluded that such assertion under all of the circumstances of the case would adversely affect relations between the United States and Panama:

> • • • we are of the opinion that we ought not at this time reach out to inject further U.S. governmental regulation of matters affecting Panamanian citizens employed in the Canal Zone, when the entire matter of the scope and effect of this country's presence in that zone is a matter undergoing international negotiations. To assert jurisdiction for the first time in this Board's history at this particular juncture would be to risk a negative impact on negotiations. Having refrained thus far from exercising the full extent of our statutory jurisdiction by asserting jurisdiction in this distant area, we see no compelling reason to do so now, and have no desire to take any action which might be a factor in jeopardizing the prospects for a negotiated settlement of the respective rights and duties of the United States and the

Panamanian government with respect to Canal Zone matters.

Contract Services, supra, at p. 10 (slip opinion)

On May 22, 1973, the Union filed a motion in this Court to compel the Board to assert jurisdiction in the Canal Zone, and to conduct a representation election pursuant to § 9(c) of the Act. The Board renewed its motion to dismiss the complaint. Extensive memoranda were filed by the parties and oral arguments in support of their respective positions were heard thereafter.

For the reasons cited in this opinion, we will grant the Board's motion to dismiss the complaint, on the ground that this Court lacks jurisdiction over the subject matter of the action.

Because of the complexity of the issues presented in this case, we will discuss seriatim the decisions of the Supreme Court and the lower federal courts pertaining to the jurisdiction of a District Court to review representation proceedings of the Board under § 9(c) of the Act.

I. Leedom v. Kyne

The Wagner Act became law on July 5, 1935, after a brief and unhappy experience with a predecessor statute, Public Resolution 44, June 19, 1934, 48 Stat. 1183, c. 677, which had permitted immediate judicial review of Board orders in representation proceedings in the Courts of Appeals. The legislative history of the Wagner Act establishes that Congress considered these review provisions to be the chief weakness of Public Resolution 44, because dilatory tactics by employers could indefinitely postpone representation elections. For this reason, § 9 of the Wagner

Act was purposefully drawn to exclude any review of representation orders in the Courts of Appeals, except in the single category of cases involving unfair labor practice proceedings pursuant to § 10 of the Act.

In American Federation of Labor v. N.L.R.B., 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (1940), the Supreme Court extensively reviewed this legislative history, and concluded that "Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in § 9(d)." *AFL, supra,* at 411. The Court expressly rejected the contention that the narrowly circumscribed review provisions of the Act should be relaxed when a union, rather than an employer, was seeking judicial review:

> An argument, much pressed upon us, is, in effect, that Congress was mistaken in its judgment that the hearing before the Board in proceedings under § 9 (c), with review only when an order is made under § 10(c) directing the employer to do something "provides an appropriate safeguard and opportunity to be heard", House Rep. p. 23, and that "this provides a complete guarantee against arbitrary action by the Board", Sen. Rep. p. 14. It seems to be thought that this failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected. But these are arguments to be addressed to Congress and not the courts. • • •

AFL, supra, at 411-12 (footnote omitted)

In a companion case, N.L.R.B. v. International Brotherhood of Electrical Workers, 308 U.S. 413, 60 S.Ct. 306, 84 L.Ed. 354 (1940), the Court applied the same reasoning to election orders of the Board.

In the *AFL* and *IBEW* cases, the Supreme Court construed the internal review provisions of the Wagner Act with respect to the extent that these provisions conferred jurisdiction on Courts of Appeals to directly review the action of the Board. The Court definitively concluded that the statutory scheme which confers jurisdiction must be examined to determine the inherent limitations of that jurisdiction. Thus the Court denied review of Board orders in representation proceedings when such review is sought in the Courts of Appeals, but did not categorically preclude a general judicial review, if original jurisdiction rests with the District Courts pursuant to 28 U.S.C. § 1337. This question was expressly reserved in *AFL*:

> The Board argues that the provisions of the Wagner Act, particularly § 9(d), have foreclosed review of its challenged action by independent suit in the district court * * *. But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code, 28 USCA § 41. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and

> adequately considered only when it is brought to us for review upon a suitable record.
>
> *AFL, supra,* at 412.

Five years later, the Supreme Court again expressly reserved decision on the question of the jurisdiction of the District Courts to review certification proceedings under § 9(c). In Inland Empire District Council v. Millis, 325 U.S. 697, 65 S.Ct. 1316, 89 L.Ed. 1877 (1945), the Court avoided the jurisdictional issue by reaching the merits of the controversy, and concluded that the Board had not acted unlawfully.

> Petitioners earnestly urge that this case presents the required showing of unlawful action by the Board and resulting injury. Unless they are right in this view, it would be inappropriate, as was said in the American Federation of Labor Case, to determine the question of reviewability. That question should not be decided in the absence of some showing that the Board has acted unlawfully. Upon the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law.
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> *Inland Empire, supra,* at 700.

The jurisdictional test proposed in *AFL* and *Inland Empire* is grounded upon the following three critical bases:

1. "unlawful" action by the Board;
2. injury to petitioners; and

3. a legal remedy, apart from the review provisions of the Wagner Act.

By focusing on the "unlawfulness" of the Board's conduct, however, the Court tended to blur the conceptual distinction between the jurisdictional and substantive aspects of a particular controversy.

In essence, the application of an "unlawfulness" test would appear to confer jurisdiction on the District Court for plenary review of *any* action by the Board, because an allegation of unlawful conduct requires the court, in the first instance, to examine the merits of the case in order to determine the threshhold question of jurisdiction.

Accordingly, the landmark Supreme Court decision in Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed. 2d 210 (1958), must be considered within this context. Kyne involved a labor organization which petitioned the Board for certification as the exclusive bargaining agent for all nonsupervisory professional employees at a particular plant. The Board held a hearing on the petition, and concluded that the appropriate bargaining unit included the 233 professional employees in the plant, as well as 9 employees who were found to be nonprofessional employees, within the meaning of §2(12) of the Act, but who shared a close community of employment interests with the professional employees. The union requested the Board to take a vote among the professional employees to determine if a majority favored inclusion in a bargaining unit composed of professional and nonprofessional employees. The Board refused to hold such an election, in spite of the clear prohibition of §9(b)(1) of the Act, which provides that, in determining the unit appropriate for collective bargaining, the Board "shall not * * * decide that any unit is appropriate for such purposes if such unit includes both profes-

sional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such a unit." The union was subsequently certified as the exclusive bargaining agent for both the professional and non-professional employees in the unit, but thereafter brought suit in the District Court to have the certification order set aside because of the inclusion of the non-professional employees. The Supreme Court held that, under these circumstances, the District Court had jurisdiction to grant the relief sought pursuant to 28 U.S.C. §1337.

> This suit is not one to "review", in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9(b)(1) is clear and mandatory. It says that, in determining the unit appropriate for the purposes of collective bargaining, "the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." (Emphasis added.) Yet the Board included in the unit employees whom it found were not professional employees, after refusing to determine whether a majority of the professional employees would "vote for inclusion in such a unit." Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal

District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

Leedom v. *Kyne, supra,* at 188, 189.

Justice Frankfurter and Brennan dissented in Leedom v. Kyne, arguing that the Court, in effect, was adopting an "unlawfulness"[1] test, with the result that District Courts would be flooded with litigation which would defeat the carefully circumscribed review provisions in §10 of the Act.[1] Justice Brennan wrote:

> I daresay that the ingenuity of counsel will, after today's decision, be entirely adequate to the task of finding some alleged "unlawful action", whether in statutory interpretation or otherwise, sufficient to get a foot in a District Court door under 28 USC §1337. • • •

Leedom v. *Kyne, supra,* at 195-196.

However, the Supreme Court, in two subsequent decisions, held that District Court jurisdiction pursuant to the holding in Leedom v. Kyne is exceedingly narrow, and exists only when there are truly extraordinary circumstances.

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[1] The dissenting Justices also noted that Congress had considered amending § 9(d) at the time the Taft-Hartley legislation was enacted in order to permit direct review in the Courts of Appeals of Board certifications upon the petition of any person interested. A House amendment which incorporated such a provision was rejected by the Senate for the same reasons that were previously advanced to defeat a similar proposal in the Wagner Act debates. The House yielded to the Senate and the review provisions of § 9(d) remained unchanged. *Kyne, supra,* at 193-194.

In McCulloch v. Sociedad Nacional, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed. 2d 547 (1963), the Board had ordered a representation election among seamen employed aboard vessels owned by a Honduran subsidiary of the United Fruit Company. With one exception, all of the employees were Honduran nationals, subject to the provisions of the Honduran Labor Code. The petitioner before the Board was the National Maritime Union, which under Honduran law was prohibited from representing the employees specified in the petition. Under international law, the law of the flag state (in that case Honduras, because all of the vessels were of Honduran registry) ordinarily governs the internal affairs of the ship. Under those circumstances, and in light of the possibility of international discord and retaliatory action by other governments, the Supreme Court held that the District Court had jurisdiction to strike down the election order of the Board.

Mr. Justice Clark wrote:

> * * * Having examined the question whether the District Court had jurisdiction at the instance of Sociedad [the Honduran union] to enjoin the Board's order, we hold that the action falls within the limited exception fashioned in Leedom v. Kyne [citation omitted]. In that case judicial intervention was permitted since the Board's order was "in excess of its delegated powers and contrary to a specific prohibition in the Act." Id. 358 US at 188. While here the Board has violated no specific prohibition in the Act, the overriding consideration is that the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our

> government. Important interests of the immediate parties are of course at stake. But the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for *prompt judicial resolution* of the controversy over the Board's power. No question of remotely comparable urgency was involved in Kyne, which was a purely domestic adversary situation. *The exception recognized today is therefore not to be taken as an enlargement of the exception in Kyne.*
>
> *Sociedad Nacional, supra,* at 16, 17. (Emphasis added.)

In the second case, Boire v. Greyhound Corporation, 376 U.S. 473, 84 S.Ct. 694, 11 L.Ed. 2d 849 (1964), the Board concluded that Greyhound and Floors, Inc. were joint employers of a group of employees which constituted an appropriate bargaining unit, and directed an election among those employees. Greyhound filed suit in the District Court to set aside the decision of the Board and to enjoin the election. The District Court found *First*: that jurisdiction existed under the rule of Leedom v. Kyne, and *Second*: held on the merits that Floors, Inc. was the sole employer of the employees in question, with the result that the Board had therefore violated the Act by directing an election when no employment relationship existed between the employees and the purported employer. The Supreme Court ruled that there was no jurisdiction under *Kyne*:

> • • • The argument is • • • that the present case is one which falls within the narrow limits of Kyne, as the District Court and the Court of Appeals held.

The respondent points out that Congress has specifically excluded an independent contractor from the definition of "employee" in § 2(3) of the Act. It is said that the Board's finding that Greyhound is an employer of employees who are hired, paid, transferred and promoted by an independent contractor is therefore, plainly in excess of the statutory powers delegated to it by Congress. This argument, we think, misconceives both the import of the substantive federal law and the painstakingly delineated procedural boundaries of Kyne.

Whether Greyhound, as the Board held, possessed sufficient control over the work of the employees to qualify as a joint employer with Floors is a question which is unaffected by any possible determination as to Floors' status as an independent contractor, since Greyhound has never suggested that the employees themselves occupy an independent contractor status. And whether Greyhound possessed sufficient indicia of control to be an "employer" is essentially a factual issue, unlike the question in Kyne, which depended solely upon construction of the statute. The Kyne exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.

Greyhound, supra, at 481, 482. (Emphasis added)

The decisions in *Sociedad Nacional* and *Greyhound* suggest that the Supreme Court has rejected the broad "unlawfulness" test adumbrated in *AFL* and *Inland Empire*, tests criticized by Justices Brennan and Frankfurter in *Kyne*. The proper jurisdictional standard is considerably narrower, although lower courts have had difficulty in determining its precise limits.

If *Kyne* is confined to its facts, the "exception" is very narrow indeed: the Board in that case had conceded that in commingling professional with nonprofessional employees in the bargaining unit, it "had acted in excess of its powers and had thereby worked injury to the statutory rights of the professional employees." *Kyne, supra,* at 187. The prohibition of § 9(b)(1) was quite specific, and there was little room for statutory interpretation: as the Court said, the provision was "clear and mandatory". *Kyne, supra,* at 188. If *Kyne* had been limited to the circumstances presented in that action, much of the subsequent litigation would never have arisen.

But, as commentators were quick to point out, the election and certification provisions of the Act contain many clauses which are not specific prohibitions of the type considered in *Kyne;* rather they are cast in language which is mandatory. See Cox, *The Major Labor Decisions of the Supreme Court October Term 1958, 1959 Proceedings of A.B.A. Section of Labor Relations Law* 23, reprinted in Gellhorn and Byse, *Administrative Law* 441 (4th Edition 1960). If such provisions were held to be sufficiently "clear and mandatory", the District Courts would have jurisdiction to compel the Board to perform affirmative acts apparently required by the language of the Act.

This problem was discussed at length by Judge Friendly in a decision rendered shortly after Leedom v. Kyne was decided:

> If appellant is to prevail, it must therefore be on the basis that Leedom v. Kyne cannot rationally be restricted to the case of flouting a clear statutory command but must be taken to recognize jurisdiction of the District Court to enjoin representation orders whenever there is a colorable allegation that the Board has misread the declared will of Congress and the remedy afforded by § 9(d) is likely to prove inadequate, as it would be for appellant here if appellant were to lose the election and Pilgrim entered into a contract with its Board-certified rival. Fears that Leedom v. Kyne had opened exactly such a Pandora's box were expressed in Mr. Justice Brennan's dissent [in Leedom v. Kyne] and by a leading commentator on labor law, Cox, The Major Labor Decision of the Supreme Court, October Term, 1958, reprinted in Gellhorn and Byse, Administrative Law (4th Ed. 1960), 441, 443. However, dissenting opinions are not always a reliable guide to the meaning of the majority; often their predictions partake of Cassandra's gloom more than of her accuracy. Up to this point, at least, there has been no tendency to expand the exception. Since Leedom v. Kyne, the Court of Appeals for the District of Columbia, where most suits to enjoin the Board have been brought in order to avoid the problem whether regional directors are sufficient parties defendant, has resisted every effort to apply that decision to orders in § 9 (c) proceedings, alleged to violate statutory or constitutional commands [citing cases]. • • •

Local 1545, United Brotherhood of Carpenters v. Vincent, 286 F.2d 127, 132 (2d Cir. 1960).

In the years that followed the *Carpenters* decision, the forebodings of Mr. Justice Brennan and Professor Cox were proved to be prescient. In 1963, the Court of Appeals for the District of Columbia Circuit held that Kyne was applicable to the "shall certify" clause of § 9(c)(1), Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch, 322 F.2d 993 (D.C. Cir. 1963), and the holding was followed in Bullard Company v. N.L.R.B., 253 F.Supp. 391 (D.D.C. 1966), I.U.E. v. N.L.R.B., 67 L.R.R.M. 2361 (D.D.C. 1968), and United Automobile, A. & A.I. Workers of America v. N.L.R.B., 317 F.Supp. 1162 (D.D.C. 1970). The Court of Appeals for the Fifth Circuit has held that the *Kyne* rule applies to the "shall direct an election" clause of § 9(c)(1), at least when the Board refuses to process a decertification petition on the basis of a mechanically applied "blocking charge" policy, Templeton v. Dixie Color Printing Company, 444 F.2d 1964 (5th Cir. 1971), Surrat v. N.L.R.B., 463 F.2d 378 (5th Cir. 1972).

While the Court of Appeals for the Third Circuit has not directly confronted the problem, its decisions on the subject have supported a generally restrictive view of the *Kyne* exception. See Firestone Tire & Rubber Company v. Samoff, 365 F.2d 625 (3d Cir. 1966); LaPlant v. McCulloch, 382 F.2d 374 (3d Cir. 1967).

From our review of the definitive decisions and commentaries thereon, we are persuaded that the exception enunciated in the majority holding in *Kyne* should neither be mechanically restricted to violations of "shall not" clauses in the Act, nor automatically extended to any clause

which contains the word "shall" or similar language of apparently mandatory intent. Rather, it is the task of the District Court to carefully examine the provision in question, and to determine from the context, from the structure and purposes of the Act as a whole, from prior practice in the Board and decisions in the Courts, whether the terms are indeed sufficiently "clear and mandatory" to confer jurisdiction under the rule of *Kyne*. This approach is not free of difficulty. But, as Judge Friendly wrote in *Carpenters*:

> • • • To be sure, the distinction between violation of a clear and of a not so clear statutory command is neither completely satisfying nor, save where violation is conceded, as it was in Leedom v. Kyne, readily applied. However, the distinction seems to us to have been made by the Supreme Court in carving out what was intended to be a narrow exception to a rule that is founded on important considerations of history and policy. • • •
>
> *Carpenters, supra,* at 133.

This standard has been criticized on the ground that the distinction between "illegal" and "clearly illegal" action by the Board is largely illusory. See Note, 66 Columbia L.Rev. 1546, 1551 (1966). But if Leedom v. Kyne is to have any application beyond cases in which the Board admits a violation of the Act—(and, after *Kyne,* such admissions have been rare)—and if at the same time, the Pandora's box created by Kyne is to not open and unleash the forces that will destroy the carefully circumscribed review provisions of the Act, an ad hoc test must be fashioned and applied by District Courts.

Professor Jaffe has compared the narrow jurisdictional standard under *Kyne* with the traditional scope of mandamus. After discussing the decisions in *Kyne* and *Sociedad Nacional*, he concluded that the proper standard could be expressed in terms of "the type of gross transgression for which we invoke the label 'jurisdictional' or 'clear errors of law' (the scope in mandamus)." L. Jaffe, *Judicial Control of Administrative Action* 348 (1963).

While we decline to adopt Jaffe's terminology, his analysis is useful, in that it rejects on logical and policy grounds a rigid insistence upon a violation of an express prohibition of the Act as a precondition of District Court jurisdiction, but confines such jurisdiction to an extremely narrow range of actions by the Board. It is only when the Board is guilty of "clear errors of law"—presumably, in those areas in which all courts agree a "gross transgression" has occurred—that District Court jurisdiction is properly invoked. Jaffe refers to judicial "intervention" rather than judicial "review", phraseology which indicates that recourse to the court under such circumstances is an extraordinary deviation from the procedure mandated in the review provisions of the Wagner Act.

We are aware that some lower courts have fashioned a broader test than that which we apply in the instant case. We are convinced, however, that a more expansive reading of Leedom v. Kyne opens the door to the type of plenary District Court review of Board orders that was condemned in Boire v. Greyhound. Such a test in essence is a return to the "unlawfulness" test which has been repudiated by the Supreme Court, and in fact leads to a hopeless commingling of the jurisdictional aspects with the merits of a given case.

This danger is well illustrated in two recent cases in the Court of Appeals for the Fifth Circuit, Templeton v. Dixie Color Printing Company, and Surratt v. N.L.R.B., *supra*. Both cases involved the application by the Board of its "blocking charge" policy, through which it will refuse to conduct a representation election when there are substantial unfair labor practice charges pending before the Board. There is no provision in the Act, nor in the Board's Rules and Regulations which authorize such a policy; nevertheless, this policy has been followed by the Board for more than three decades. See United States Coal & Coke Co., 3 N.L.R.B. 398 (1937). It is not an inflexible one, however, and in individual cases the Board has concluded that the policies of the Act are best effectuated by conducting an election rather than by postponing one. Columbia Pictures Corporation, 81 N.L.R.B. 1313 (1949). The blocking charge policy has been subject to criticism, see Pacemaker Corp. v. N.L.R.B., 260 F.2d 880 (7th Cir. 1958), but it has also been explicitly approved by the Courts, Furr's Inc. v. N.L.R.B., 350 F.2d 84 (10th Cir. 1965). See also Surprenant Mfg. Co. v. Alpert, 318 F.2d 396 (1st Cir. 1963).

Subsequently, the Court in *Dixie Color Printing Company, supra*, concluded that the application by the Board of the blocking charge policy to hold in abeyance for three years an employee decertification petition was contrary to the specific mandate of § 9(c)(1), and therefore conferred jurisdiction on the District Court to compel the Board to process the decertification petition. The decision was based on the "particular circumstances" of the case, notably the long delay in resolving the pending unfair labor practice charges, and the Court did not purport to resolve the issue of the extent to which the blocking charge policy might be validly applied, or under what circum-

stances the Board might justifiably exercise its discretion in refusing to process a representation petition. *Dixie Color Printing Company, supra,* at 1070.

In *Surratt,* which reached the Court a year after *Dixie Color Printing Company,* the blocking charge policy was applied by the Board in a similar decertification context; however, the hearing on all pending unfair labor practice charges was to be held within five months after the Board finally dismissed the decertification petition, or approximately eight months after the original petition was filed with the Regional Director. The Court nevertheless relied on the earlier decision and found that the difference in delay was one of degree and hence was not a controlling principle. *Surratt, supra,* at 381. The decision in *Dixie Color Printing Company* was said to rest on the mechanical application by the Board of the blocking charge policy "as a *per se* rule without exercising its discretion to make a careful determination in each individual case whether the violation alleged is such that consideration of the election petition ought to be delayed or dismissed." *Surratt, supra,* at 381. Under these circumstances, the District Court was said to have jurisdiction to compel the Board to exercise its discretion.[2]

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[2] The decisions in *Dixie Color Printing* and *Surratt* are also based on the fact that *employee* decertification petitions were blocked by *union* charges of unfair labor practices. The employees were thus "disarmed" by a union which the employees said no longer represented them. But there are two problems with such an approach: In the first place, there is no indication that the "exception" in these cases will not be expanded in future cases, as *Surratt* extended *Dixie Color Printing* to the case in which there is no inordinate delay by the Board. More fundamentally, however, it is hard to see why the provisions of § 9(c)(1) are "clear and mandatory" in one narrowly circumscribed situation and not "clear and mandatory" in other situations. Once again, this approach fails to distinguish issues of jurisdiction from those going to the merits of the case.

The difficulties of such an approach are obvious. Beyond the problem of compelling the Board to exercise the discretion which in fact it purports to exercise, *Columbia Pictures Corporation, supra,* the real difficulty lies in the confusion of jurisdictional questions with those which go to the merits of the controversy. It may well be that the blocking charge policy is unwise, either generally or in particular circumstances. We do not doubt that Congress could legislatively change the policy, or that the Courts of Appeals in cases which properly reach them under § 10 could impose restrictions on its application. But the wisdom or legality of the policy is not immediately before the District Court under Leedom v. Kyne. If there is substantial disagreement about either the wisdom or legality of the policy—and the decisions of the courts indicate that there is such disagreement—then it simply cannot be said that the Board has violated a "clear and mandatory" provision of the Act, and jurisdiction therefore cannot be conferred upon District Courts by invoking Leedom v. Kyne.

Within the proper framework of the *Kyne and Greyhound* decisions, and through application of the analytical techniques proposed by Judge Friendly and Professor Jaffe, we now turn to an examination of the contentions of the Union in the present case.

In essence, the Union contends that the provisions of § 9(c)(1) are mandatory, and that a purported violation of these provisions by the Board confers jurisdiction on the District Court under the *Kyne* exception. Section 9(c)(1) provides as follows, in pertinent part:

> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> • • •

> the Board *shall investigate* such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing* upon due notice. • • • If the Board finds upon the record of such hearing that such a question of representation exists, it *shall direct an election* by secret ballot and *shall certify* the results thereof.
>
> (Emphasis added).

All parties concede that the Board has taken no action "contrary to a specific prohibition in the Act", nor has it attempted to exercise a power that has been "specifically withheld". The Union argues, however, that the finding that a question of representation affecting commerce exists requires the Board to direct an election and to certify the results of that election. The existence and ensuing violation of such a duty is said to confer jurisdiction on the District Court to compel affirmative action by the Board.

In our analysis of the provisions of § 9(c)(1), we have the benefit of Judge Weinfeld's extensive opinion in National Maritime Union of America v. N.L.R.B., 267 F.Supp. 117 (S.D.N.Y. 1967), which denied District Court review of the original Board decision in *United Fruit*. In that case, the National Maritime Union had petitioned for certification as the bargaining representative of the clerical employees of the United Fruit Company in the Canal Zone. The Union petitioned the District Court for an order to compel the Board to conduct a represenation election, but the Court concluded that it was without jurisdiction over the subject matter of the action, since the statutory command of

§ 9(c)(1) did not meet the requirements of clarity and specifically established in *Kyne* and *Carpenters.*

> The Union contends that this provision is mandatory and that if a question of representation affecting commerce exists, the Board is entirely without discretion but must direct an election. The Union's position disregards prior interpretations of and practice under 9(c)(1).
>
> This statutory provision sets out the general steps to be followed in the processing of representation petitions: investigation; hearing; election; certification. Since the provision for each stage is preceded by the word "shall", accepting the Union's literal interpretation would mean that the section imposes upon the Board a series of mandatory steps which it must follow in processing representation petitions. Section 9(c)(1) has never been interpreted or applied in this manner; the Board has been permitted and has exercised considerable discretion in processing representation petitions.
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> National Maritime Union v. N.L.R.B., *supra*, at 121, 122.

We are in agreement with the decision of the Court in National Maritime Union v. N.L.R.B., *supra*, to the effect that the provisions of § 9(c)(1) are *not* sufficiently "clear and mandatory" to fall within the exception engrafted by Leedom v. Kyne because of the discretion and leeway vested in the Board in representation proceedings, and judicial and Congressional approval of the exercise of that discretion.

We note, *inter alia*, the following parameters of Board discretion, notwithstanding the apparently mandatory language of § 9(c)(1):

First: Prior to the enactment of § 14(c) in 1959, the Board refused to assert jurisdiction over businesses which did not meet dollar volume standards set by the Board, even though the statutory basis for jurisdiction existed, and § 9(c) contained the same apparently mandatory language which it contains today.[3] This practice was approved by the Supreme Court in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959). It was codified in § 14(c) of the Act, 73 Stat. 541, 29 U.S.C. § 164(c)(1), which has been held to apply to representation proceedings as well as to unfair labor practices, notwithstanding a superficial inconsistency with the "mandatory" language of § 9(c)(1). See National Maritime Union v. N.L.R.B., *supra*, at 122, 123, and cases cited therein.[4]

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[3] The Board has referred to these minimum dollar volumes as "jurisdictional" standards. This use of the term "jurisdictional" is not correct, because the Board has statutory jurisdiction over the business, but declines to invoke this jurisdiction. N.L.R.B. v. Pease Oil Co., 279 F.2d 135, 137 (2d Cir. 1960), enforcing 123 N.L.R.B. 660 (1959). The Board's standards are properly termed "discretionary" rather than "jurisdictional". See 2 Kheel *Labor Law* § 8.03[1].

[4] Nor can it be argued that § 14(c)(1) operates as a limit upon the discretion of the Board to decline to exercise jurisdiction in cases which do not involve dollar volume standards. Section 14(c)(1) was enacted as part of the Landrum-Griffin amendments in 1959, in response to the "no-man's land" in which the Board might decline to exercise jurisdiction. The states, however, were prevented from exercising jurisdiction by the decision in Guss v. Utah Labor Relations Board, 353 U.S. 1, 77 S.Ct. 598, 1 L.Ed. 2d 601 (1957). Section 14(c)(2) explicitly overrules the *Guss* decision, in part in response to an invitation to do so contained in *Guss*. 353 U.S. at 10-12. See McCulloch v. Sociedad Nacional, *supra*, at note 10; 2 Kheel *Labor Law* § 8.01[3].

Second: The Board has developed and applied the "contract-bar" doctrine, which prevents the holding of a representation election when a valid and binding collective bargaining agreement exists which is to be effective for a "reasonable" period and has been negotiated by a union with majority status prior to the claim of a rival labor organization. This doctrine is not enunciated in the Act, yet the Board has broad discretion in applying it on a case-by-case basis. See 3 Kheel, *Labor Law* § 13.04[1]. The contract-bar doctrine has been upheld by the courts, notwithstanding an apparent inconsistency with the purportedly "mandatory" provisions of § 9(c)(1). N.L.R.B. v. Local 3, International Brotherhood of Electrical Workers, 362 F.2d 232 2d Cir. 1966); Local 1545, United Brotherhood of Carpenters, etc. v. Vincent, *supra;* N.L.R.B. v. Martin Building Material Company, 431 F.2d 1246 (5th Cir. 1970); N.L.R.B v. Libbey-Owens-Ford Glass Company, 241 F.2d 831 (4th Cir. 1957); Local Union No. 492, etc., v Schauffler, 162 F.Supp. 121 (E.D. Pa. 1958).

Third: For many years, the Board has declined to assert jurisdiction in those situations in which statutory jurisdiction concededly exists, when the Board has determined that assertion of jurisdiction would not "effectuate the policies of the Act."

For example, there is no general statutory exclusion of nonprofit institutions,[5] but the Board will not exercise jurisdiction over nonprofit institutions engaged in noncommercial activities, even though the operations of these institutions may have a substantial effect on interstate com-

[5] Section 2(2) of the Act excludes from statutory jurisdiction only nonprofit hospitals.

merce. Young Men's Christian Association of Portland, Oregon, 146 N.L.R.B. 20 (1964). But see Council 19, American Federation of State, County and Municipal Employees v. N.L.R.B., 296 F.Supp. 1100 (N.D. Ill. 1968).

In Trustees of Columbia University, 97 N.L.R.B. 424 (1951), the Board specifically found that the activities of the university affected commerce sufficiently to satisfy the requirements of the Act, but declined to assert jurisdiction since it would not effectuate the policies of the Act to do so. The *Columbia University* doctrine was followed by the Board for nearly two decades, without court intervention, until the Board itself overruled the earlier decision in Cornell University, 183 N.L.R.B. No. 41 (1970). But even the *Cornell University* doctrine may not be followed in cases which would not effectuate the policies of the Act to do so. Temple University of the Commonwealth System of Higher Education, 194 N.L.R.B. No. 195 (1972).

Additional examples of the exercise by the Board of its discretion to decline jurisdiction even though statutory jurisdiction exists may be found in National Maritime Union of America v. N.L.R.B., *supra*, at note 41.

We do not imply that the discretion of the Board is unlimited, nor that the Board's conclusion that a particular action would not "effectuate the policies of the Act" is necessarily the last word.[6] In the instant case, however, we are dealing not with the wisdom of a particular Board policy, nor even with its legality in the usual sense; instead we are confronted with the principles governing *jurisdiction* of Federal District Courts to review Board action.

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[6] Judicial review of the Board's action is normally by means of a petition for enforcement or review under §§ 10(e) and 10(f). In cases properly before the Courts of Appeals under § 10, of course, a purported exercise of discretion by the Board would be subject to challenge.

Kyne and *Greyhound* teach us that disagreement with the Board on a matter of policy or statutory interpretation is not a sufficient basis for assertion of jurisdiction; under such circumstances, we do not have the right to consider the merits of a particular controversy. To the contrary, our jurisdiction is properly limited to intervention in those cases and only in those cases in which the Board has violated a "clear and mandatory" command of the Act. In light of the history of administrative and judicial interpretation of the Act, we hold that the provisions of §9(c)(1) which require the Board to *direct an election* once it is determined that a question of representation affecting commerce exists are not sufficiently "clear and mandatory" to confer jurisdiction on federal District Courts under Leedom v. Kyne.

II. Fay v. Douds

The Union further contends that this Court has jurisdiction to review the Board's order under the doctrine of Fay v. Douds, 172 F.2d 720 (2d Cir. 1949). We do not agree.

Fay v. Douds involved a dispute between two unions over representation of employees in a bargaining unit. Local 475, United Electrical, Radio and Machine Workers of America, CIO, was the exclusive bargaining agent for the employees, but the Board found that the collective bargaining agreement had been opened up for negotiation, and the contract bar rule was therefore inapplicable to prevent a representation election. The United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, filed a petition with the Board for certification as the exclusive bargaining agent of the employees. The Re-

gional Director ruled that Local 475 had not complied with certain provisions of the Act, and therefore lacked status to object to a consent election. The Local protested this ruling to the Regional Director and to the Board, but its objections were overruled, without a hearing. The election was subsequently held, using a ballot that contained only the name of the Automobile Workers Union, which received a majority of the votes cast, and was thereupon certified by the Board. Local 475 brought suit in the District Court, which dismissed the complaint. The Court of Appeals for the Second Circuit, per Learned Hand, Ch. J., affirmed on the merits, but upheld the jurisdiction of the District Court to entertain the action.

Chief Judge Hand's opinion relied upon dictum in an earlier Second Circuit case, Fitzgerald v. Douds, 167 F.2d 714 (2d Cir. 1948), which stated that while Congress might grant or withhold judicial review of administrative action within a statutory framework, there could be situations in which the Constitution required such review. *Fitzgerald, supra,* at 717. The plaintiff in *Fay* claimed that under the circumstances of that case there was a constitutional right to District Court review of the Board's action. The Court of Appeals agreed, but based its decision on the denial of a hearing by the Board:

> The first question is as to the jurisdiction of the District Court which the defendant disputes, invoking our decision in Fitzgerald v. Douds. We there held that, since the only review of a "certification" proceeding under §9 was as an incident to a petition to review an order of the Board under §10, the remedy so created was exclusive; although we recognized that the result might be otherwise, if a constitutional question were raised. The plaintiff at bar does raise

such a question; he asserts that the Local has a "property" right in the maintenance of its position as the exclusive bargaining agent, and that this was substantially invaded by denying its privilege of a hearing upon the "investigation", preparatory to deciding whether an election should be called. If this assertion of constitutional right is not transparently frivolous, it gave the District Court jurisdiction; and, having once acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable. Although, as will appear, we do not think that the Local was denied any constitutional right, we do think that its contention is not so plainly untenable that the District Court might not proceed to decide the issues involved. The Local's interest in remaining the exclusive bargaining agent was of great importance to it, and to dispense with the "investigation" on the outcome of which depended the calling of an election, would imperil its position, even though it could not be "certified" upon an election. To do this without any hearing can plausibly be thought to be a denial of due process of law. * * *

Fay, supra, at 723. (footnotes omitted.)

The decision in *Fay* preceded Leedom v. Kyne by nine years. The doctrine established therein has never been recognized by the Supreme Court, and there is considerable doubt as to its validity, in light of the narrow exception delineated in *Kyne, Greyhound,* and *Sociedad Nacional.* The doctrine has been questioned in several lower court decisions, see Greensboro Hosiery Mills, Inc. v. Johnston, 377 F.2d 28, 32 (4th Cir. 1967), and Boire v. Miami Herald

Publishing Company, 343 F.2d 17, 21 (5th Cir. 1965), cert. den. 382 U.S. 824, 86 S.Ct. 56, 15 L.Ed. 2d 70 (1965), and its future appears uncertain even in the Second Circuit, Herald Company v. Vincent, 392 F.2d 354, 359 (2d Cir. 1968).

The *Fay* doctrine has never been adopted in the Third Circuit, and there is at least one case which has rejected its basic premise, though without reference to Fay v. Douds. In Firestone Tire & Rubber Company v. Samoff, *supra,* two labor organizations were competing to organize the employees in a particular plant. An election was held, and the employees voted against being represented by either union. After an objection to the election was filed by one of the unions, the Regional Director determined that the employer had impermissably interfered with the free choice of the employees in the election, and ordered a second election. The employer filed suit in the District Court to enjoin the second election, and a preliminary injunction was granted, on the grounds that the Board had violated a specific prohibition of the Act [§ 9(c)(3)], and had "violated the Company's constitutional right in not offering it an opportunity to be heard before the second election was directed * * *." *Firestone, supra,* at 627. The Court of Appeals for the Third Circuit reversed, and held that the District Court lacked jurisdiction to grant the requested relief. The Court rejected the employer's claim that a "violation" of § 9(c)(3) conferred jurisdiction on the District Court under the theory of Leedom v. Kyne, and went on to state, at 628:

> "* * * there is no provision in the Act which requires a hearing on objections to an election based on pre-election conduct. *The question whether the Constitution required it is not of itself grounds for jurisdiction in the district court.* * * *
>
> (emphasis added)

In light of this statement, and the Court's disposition of the case, it seems extremely unlikely that a Fay v. Douds theory of District Court jurisdiction would be adopted in the Third Circuit.

However, even assuming that Fay v. Douds accurately states the law, the Union in the present case could not rely on that decision to support jurisdiction in this Court. The *Fay* doctrine was explicitly based up the *denial of a hearing* by the Board when a property right is at issue.[7] As the Court stated:

> [To dispense with an investigation] *without any hearing* can plausibly be thought to be a denial of due process of law.* * *
>
> *Fay, supra,* at 723.
>
> (emphasis added)

In the present case, the Union had a full hearing before a hearing examiner, and the record of this proceeding was the basis for the Board's decision.

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[7] Because of our disposition of the case, it is unnecessary to reach the subsidiary issue of whether the Union's "expectancy" of winning an election and becoming the exclusive bargaining agent for the employees in question is a sufficient property interest to bring into play the due process clause of the 5th Amendment. *Compare* Amalgamated Meat Cutters etc. Local 576 v. Allen, 298 F.Supp. 985 (W.D. Mo. 1969), aff'd 423 F.2d 267 (8th Cir. 1970) *with* Council 19, American Federation of State, County, and Municipal Employees v. N.L.R.B., *supra.*

Authority in the Second Circuit since Leedom v. Kyne has made it clear that Fay v. Douds is to be limited to denials of procedural due process—the refusal by the Board to hold a hearing before taking action which would adversely affect the plaintiff—and is not intended to affect the discretion of the Board in dealing with representation matters. In McLeod v. Local 476, United Brotherhood of Industrial Workers, 288 F.2d 198 (2d Cir. 1961), a full hearing had been held by the Board in which the plaintiff was permitted to intervene. In rejecting the contention that the Board's application of the contract bar doctrine had deprived plaintiff of a constitutional right so as to confer jurisdiction on the District Court, the Court of Appeals stated:

> In the instant case the appellee urges that the complaint presents a substantial constitutional question and hence comes within the Fay v. Douds exception to the general rule. We perceive no constitutional issue in this case. That question is discussed in this court's opinion in Local 1545 v. Vincent, supra, Congress has left to the Board much freedom of action in its handling of representation matters, including questions of contracts as bars to elections. If the Board has, in the instant case, exercised its discretion unwisely, even unreasonably, that raises no constitutional issue. Congress, by its refusal to confer jurisdiction on the District Courts, and the courts, by their adoption of the general rule subject only to the two exceptions recited above [*Fay* and *Kyne*], have made the important decision that an occasional unreasonable action by the Board, though it goes uncorrected by the courts, is a lesser

> evil than would be the frustration of seasonable elections by a broadened exposure of election questions to litigation. As is the case with any general rule, its application to particular cases may result in an injustice. If those injustices occur frequently enough, they may cause Congress to amend the legislation, or may cause the courts to invent additional exceptions. This case does not create in us the urge to invent an additional exception. If it did so, the exception would be most difficult to define, or to confine within tolerable boundaries.
>
> *Local 476, supra,* at 201.

We conclude, therefore, that even if the rationale of Fay v. Douds were adopted by the Third Circuit, the doctrine established in that case is inapplicable under the circumstances of the case at bar, because the Union has been afforded a complete hearing by the Board, and the alleged constitutional deprivation amounts to nothing more than disagreement with the manner in which the Board has exercised its judgment in the discretionary area of representation proceedings. *Local 476, supra.*

We recognize that at least one District Court has decided to the contrary, Council 19, American Federation of State, County and Municipal Employees v. N.L.R.B., *supra.* But we are convinced that such an exception is not consistent with the Supreme Court decisions in *Kyne, Greyhound,* and *Sociedad Nacional,* and that it would be "most difficult to define, or to confine within tolerable boundaries". *Local 476, supra,* at 201.

Hence, we conclude that Fay v. Douds does not and cannot confer jurisdiction upon us under the facts of this case.

III. The Administrative Procedure Act.

The Union's final contention is that this Court has jurisdiction to review the Board's action pursuant to § 10 of the Administrative Procedure Act, now 5 U.S.C. § 701 *et seq.* (hereinafter A.P.A.). Pertinent portions of the A.P.A are set forth in the footnote.[8]

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[8] § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

(Footnote continued on following page)

There has been considerable dispute in the courts and among commentators as to whether the provisions of the A.P.A. were intended as an affirmative grant of jurisdiction to the district courts to review agency action when there is no other jurisdictional basis for review. See Charlton v. United States, 412 F.2d 390, 396 (3d Cir. 1969) (concurring opinion of Judge Stahl); State of Delaware v. Pennsylvania New York Central Transportation Company, 323 F.Supp. 487, 494-495 (D.Del. 1971).

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§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

The Third Circuit, however, has settled this issue by ruling that the A.P.A. provisions in question in the instant case are remedial and not jurisdictional in nature. Local 542, International Union of Operating Engineers v. N.L.R.B., 328 F.2d 850, 854 (3d Cir. 1964); Zimmerman v. United States Government, 422 F.2d 326, 330-331 (3d Cir. 1970); Framlau Corporation v. Dembling, 360 F.Supp. 806, 808 (E.D.Pa. 1973). As the Court noted in *Local 542, supra,* at 854:

> • • • There is nothing in Section 10 or any other clause of the [Administrative Procedure] Act which extends the jurisdiction of either the district courts or the appellate courts to cases not otherwise within their competence. Ove Gustavsson Contracting Company v. Floete, 278 F.2d 912, 914 (2d Cir. 1969), cert. den. 364 U.S. 894, 81 S.Ct. 225, 5 L.Ed 2d 188; Kansas City Power & Light Company v. McCay, 96 U.S. App. D.C. 273, 225 F.2d 924, 933 (1955), cert. den. 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780. The Act is clearly remedial and not jurisdictional.

We therefore conclude that § 10 of the A.P.A. does not provide an independent jurisdictional basis in the instant action. To hold otherwise would permit plenary District Court review of orders of the Board, a result clearly inconsistent with the exceedingly narrow limits of federal District Court jurisdiction fashioned by the Supreme Court in *Kyne, Greyhound,* and *Sociedad Nacional.*[9]

• • •

[9] We note that Deering-Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961) held that § 10(e) of the A.P.A. conferred jurisdic-

(Footnote continued on following page)

Hence, we conclude that this Court lacks jurisdiction over the subject matter of the instant action. Since we will dismiss the complaint on jurisdictional grounds, we need not rule upon the Board's alternative contention that the complaint fails to state a claim upon which relief can be granted.

Dismissal of the Union's complaint in this Court may effectively foreclose the possiility of judicial review of the Board's refusal to assert jurisdiction in the Canal Zone. For those who are imbued with what Professor Jaffe has called the "presumption of judicial review",[10] such a result may not be congenial. We are convinced, however, from our analysis of the controlling legislation and its history, that Congress intended to so limit the role of the courts when it drafted the carefully circumscribed review provisions of the Act. It may well be that the occasional injustice which results from this statutory scheme is too high a price to pay for expediting the vast majority of representation elections. It may also be that the Act should

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tion on the District Court to compel the Board to proceed with reasonable expedition in the disposition of its business. The subsequent decisions which have discussed *Deering-Milliken* have limited the holding in that case to the situation in which the Board is accused of unreasonable delay. Chicago Automobile Trade Association v. Madden, 328 F.2d 766, 769-770 (7th Cir. 1964); Intertype Co., Div. of Harris-Intertype Corp. v. Penello, 269 F.Supp. 573, 579 (W.D. Va. 1967); Local 542, International Union of Operating Engineers v. N.L.R.B., *supra*, at 854. *See also* Templeton v. Dixie Color Printing Co., *supra* at note 3. The Supreme Court has never recognized such an exception to the general rule of non-reviewability of Board orders in the District Court. In any event, the *Deering-Milliken* decision has no applicability in the present case, because unreasonable delay by the Board is not advanced as a ground for relief.

[10] Jaffe, *The Right to Judicial Review* I, 71 Harv. L.Rev. 401 (1958).

permit judicial review when unions are not certified under § 9(c) proceedings. But, as Mr. Justice (later Chief Justice) Stone concluded more than thirty years ago, "these are arguments to be addressed to Congress and not the Courts.[11].

The following Order will be entered accordingly:

ORDER

AND NOW, to wit, this 6th day of May, 1974, it is ORDERED that the above captioned action be and the same is hereby DISMISSED for lack of subject matter jurisdiction.

By The Court

HERBERT A. FOGEL, J.
United States District Court

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[11] American Federation of Labor v. N.L.R.B., *supra*, at 411, 412.

Judgment Order

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1613

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Appellant,

v.

NATIONAL LABOR RELATIONS BOARD and BERNARD SAMOFF, Regional Director of the Fourth Region of the National Labor Relations Board

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Civil Action No. 71-881)

Submitted Under Third Circuit Rule 12(6)

December 9, 1974

Before:

ALDISERT, ADAMS and HUNTER, *Circuit Judges.*

JUDGMENT ORDER OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT—12/9/74

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court

opinion by The Honorable Herbert A. Fogel, 375 F. Supp. 421, (E.D. Pa. 1974), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By The Court

ALDISERT

.....

Circuit Judge

Costs taxed in favor of appellee as follows:

Brief $301.70

Attest:
Thomas F. Quinn, Clerk
THOMAS F. QUINN, Clerk

Dated: December 9, 1974

Certified as a true copy and issued in lieu of a formal mandate on December 31, 1974.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 701 et seq.

5 U.S.C. Section 701 (a):

"This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law."

5 U.S.C. Section 702:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. Section 703:

"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

5 U.S.C. Section 704:

"Agency action made reviewable by statute and final agency action for which there is no other ade-

Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 701 et seq.

quate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

5 U.S.C. Section 705:

"When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

5 U.S.C. Section 705:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 701 et seq.

applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction; authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1102

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In 1971, petitioner Union filed a petition with the National Labor Relations Board seeking a representation election among a unit of the employees of Contract Services, Inc., located in the Panama Canal Zone. The Board's Regional Director, after an administrative investigation, dismissed the petition (Pet. 1a-2a), relying on *United Fruit Company*, 159 NLRB 135, review denied, *National Maritime Union* v. *National Labor Relations Board*, 267 F. Supp. 117

(S.D. N.Y.), where the Board had dismissed a similar petition involving a Canal Zone employer. The Board denied review of the Regional Director's decision (Pet. App. 3a). Thereafter, petitioner filed suit in the federal district court seeking an order compelling the Board to conduct a hearing on its petition for a representation election (Pet. App. 4a-9a). The district court directed a hearing (Pet. App. 10a-13a), and the Board, acquiescing in this ruling, reinstated the Union's petition and remanded the case to the Regional Director for a hearing (Pet. App. 17a-19a). Following the hearing, the Board again dismissed the petition (Pet. App. 20a-31a). The Board concluded that, although it had statutory jurisdiction over the Panama Canal Zone (Pet. App. 26a), it would not effectuate the policies of the Act to assert such jurisdiction in the instant case, since that would tend adversely to affect United States-Panamanian relations (Pet. App. 30a-31a).[1]

The Union then returned to the district court, seeking to have it compel the Board to reinstate the election petition, assert jurisdiction, and conduct an election. The district court, in a thorough opinion, upon which we primarily rely, granted the Board's motion to dismiss the complaint, and held that it lacked sub-

[1] The Board noted that negotiations for a new Panama Canal treaty to replace the treaty of 1903 were still under way, and in light of this and other conditions in the Canal Zone, the Board concluded that, "[t]o assert jurisdiction for the first time in this Board's history at this particular juncture would be to risk a negative impact on negotiations" (Pet. App. 29a-30a).

ject matter jurisdiction to review the conclusion of the Board as to this question (Pet. App. 32a-70a). The court of appeals affirmed, for the reasons stated in the district court's opinion (Pet. App. 71a-72a).

2. It is settled that the district courts ordinarily have no jurisdiction to review Board actions in representation proceedings, and that the *Leedom* v. *Kyne*, 358 U.S. 184, exception to this general rule is an extremely "narrow" one. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 480-481; *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 17; *Teamsters Local 690* v. *National Labor Relations Board*, 375 F. 2d 966, 969 (C.A. 9). *Kyne* held only that the district court has jurisdiction where a suit "is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188. In *Kyne*, the Board concededly had violated a specific statutory prohibition [2] by placing professional and non-professional employees in the same bargaining unit without first affording the former a separate vote.

Contrary to petitioner's assertion (Pet. 9, 13-16), the Board has not violated the specific statutory command of Section 9(c)(1) of the Act (Pet. 4) in declining to exercise its jurisdiction here. That section

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[2] Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1), provides that, in determining the unit appropriate for collective-bargaining purposes, "the Board shall not * * * decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."

requires the Board to direct an election on a petition only if it finds that "a question of representation affecting commerce exists." Since the Board has power to decline to exercise the full measure of its statutory jurisdiction (see *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. 675, 684), Section 9(c)(1) contemplates a determination not only that statutory jurisdiction exists but also that it would effectuate the policies of the Act to exercise it in the particular case. It was thus within the Board's authority to consider whether the policies of the Act would be furthered by holding a representation election here (see discussion at Pet. App. 56a-59a), and, in making that determination, as *Sociedad*, *supra*, makes clear, considerations of international relations are highly relevant.[3]

3. There is no substance to petitioner's contention (Pet. 16-22) that the district court had jurisdiction

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[3] *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch*, 322 F. 2d 993 (C.A.D.C.), and *Templeton* v. *Dixie Color Printing Co.*, 444 F. 2d 1064 (C.A. 5), are not to the contrary. In *Miami Pressmen*, the court carefully noted that "9(c)(1) is not mandatory in all instances" (322 F. 2d at 997); that it was dealing with the requirement to certify a valid election; and that "[w]hether a question of representation exists is within that area of expertise in which courts hesitate to interfere" (*id.* at 998, n. 11). And, in *Dixie Color*, the court expressly limited its decision to "the particular circumstances presented here," adding "we do not reach the issue of * * * under what circumstances the Board might justifiably exercise its discretion in refusing to process a representation petition" (444 F. 2d at 1070). See also *National Labor Relations Board* v. *Big Three Industries, Inc.*, 497 F. 2d 43, 53-54 (C.A. 5).

of the suit under Section 10 of the Administrative Procedure Act ("A.P.A."), 5 U.S.C. 701. As the cases cited by the district court (Pet. App. 68a) show, Section 10 does not extend the jurisdiction of the district court to labor cases not otherwise within its competence. The opening clause of the section renders it applicable "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The National Labor Relations Act precludes district court review of the Board action here, and, further, as we have shown, that action was within the allowable area of the Board's discretion under the Act.[4]

Nor is there substance to petitioner's contention (Pet. 22-27) that, since an employer may indirectly obtain judicial review of Board action in a representation proceeding by refusing to bargain and awaiting a Board order (which can be reviewed under Section 10(e) or (f) of the National Labor Relations Act, 29 U.S.C. 160(e) or (f)), it is a denial of equal protection of the laws to preclude the union from ob-

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[4] *Templeton* v. *Dixie Color, supra* (Pet. 20), is inapposite. The court stated (444 F. 2d at 1070, n. 3) that "[w]e do not rely upon the [A.P.A.]" because the district court was found to have jurisdiction under *Leedom* v. *Kyne*. Also inapplicable is *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C.A. 4) (Pet. 20), which has been limited to cases where agency action is "unreasonably delayed," contrary to Section 6(a) of the A.P.A., 5 U.S.C. 555(b) (see Pet. App. 68a-69a, n. 9). Petitioner makes no such allegation here. *Knight Newspapers, Inc.* v. *United States*, 395 F. 2d 353 (C.A. 6) (Pet. 21), held that the Postmaster General's discretionary act in refusing to grant a postage refund was *not* subject to review under the A.P.A.

taining judicial review in the present case. In a truly parallel situation the treatment of union and employer is the same. Thus, an employer located in the Canal Zone, who filed an election petition with the Board which the Board declined to process because of international relations considerations, would find itself in precisely the same situation with respect to the lack of judicial review as does petitioner here.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

APRIL 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 573669 148